OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 12

to

The Legislative Assembly of British Columbia

THE WORKERS' COMPENSATION BOARD (No.2)

VOLUME 1

Legislative Assembly
Province of British Columbia

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June 18, 1985

The Honourable K. Walter Davidson
Speaker of the Legislative Assembly
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Mr. Speaker:

I have the honour to submit herewith a special report to the Legislative Assembly, pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, chapter 306.

The report deals with nine complaints arising out of decisions, practices or procedures of the Workers' Compensation Board of British Columbia. It summarizes my findings and recommendations and the responses of the Board in each case.

This report consists of two volumes. Volume 1 contains my actual report and Appendix A. Volume 2 contains Appendix B, the documentation pertaining to each of the nine investigations.

Yours sincerely,

Karl A. Friedmann
Ombudsman

OMBUDSMAN OF BRITISH COLUMBIA

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TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

THE INVESTIGATION BY THE OMBUDSMAN INTO NINE COMPLAINTS ABOUT THE WORKERS' COMPENSATION BOARD

VOLUME 1

June 18, 1985

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INTRODUCTION

This is my second Special Report to the Legislative Assembly concerning the Workers' Compensation Board. It contains nine new cases on which the Board and I have not been able to agree. One of the nine raises again an issue which was dealt with in my first report on the Workers' Compensation Board - the problem of disabling industrial allergies (Mr. Pipke's case). The Board's restrictive definition of disability means that workers who are exposed to disabling industrial allergies in their work place and who are not suitable prospects for retraining are denied compensation. Although I dealt with this issue in Special Report No. 8 (April 1984), the problem remains. I believe it is one which goes to the root of the purpose of workers' compensation.

For the first time I am also reporting on the difficult issue of the Board reimbursing workers for legal fees incurred in defending their claims as a result of improper Board conduct (Mr. Temnoff's case). Although the law allows the Board to make such payments, the Board's policy is never to pay legal fees under any circumstances. In my opinion, Mr. Temnoff's case is exceptional, the Board's fault is clear, and Mr. Temnoff's legal fees should be paid by the Board.

The same phenomenon - the Board's refusal to exercise its statutory discretion - is evidenced in the cases of Mr. Rahn and Mr. Relkoff. The Workers Compensation Act provides for two alternative methods of calculating pension awards. For years the Board refused to implement the second method, notwithstanding the duty imposed by the law. As a result Mr. Rahn and Mr. Relkoff were probably undercompensated for injuries they suffered.

Mr. Sorrenti's case is a classic Catch-22 situation. The Board denied his claim because Mr. Sorrenti could not produce doctors' reports. Mr. Sorrenti could not afford to pay for medical treatment because the Board refused to recognize his work-related injury. Therefore he did not go to a doctor.

The other five cases reported also raise important issues for the attention of the Legislative Assembly.

I submitted a report on these nine cases to the Lieutenant Governor in Council in January 1985. Subsequently, at the request of the Minister of Labour, The Honourable T. Segarty, I met with the Minister, Mr. Walter Flesher, Chairman of the Workers' Compensation Board, and other officials to discuss them in detail. However, these discussions did not lead to a change of the Board's position on any of these nine cases.

I am now asking the Legislative Assembly to assist in getting justice to these complainants.

Each complainant has agreed that I may use his name in this Special Report.

Mr. Ben Temnoff

Lawyer's Fees

Mr. Temnoff's wage loss payments had been suspended because his adjudicator wanted him to find and provide the Board with medical proof that his ongoing disability was still related to his work injury. Then his adjudicator told him that he expected to be charging him with fraud. Mr. Temnoff was also told that he could not appeal any of this until a decision was made either to cut off or to reinstate his wage loss. Mr. Temnoff then asked a lawyer to help him with his Workers' Compensation claim. He was especially concerned about the possibility of fraud charges.

Unaware that the adjudicator was seriously misrepresenting Board policy, the lawyer took the initiative in acquiring the appropriate medical reports, tried to deal with the allegations of fraud that the adjudicator kept repeating, and tried to bring the adjudicator to a decision on the claim. Mr. Temnoff had to rely on welfare in order to continue supporting his wife and children. In spite of his lawyer's efforts, a year passed with no further decision on the fraud charges and no decision on the medical information that had been sent to the Board. My office intervened at this point on the grounds of unreasonable delay by the adjudicator.

The Commissioners accepted that there was unreasonable delay and that the adjudicator was negligent in the performance of his duties. No fraud charges were laid. The adjudicator had never even referred the case for professional investigation (although Board policy required him to).

Mr. Temnoff's lawyer ultimately billed him $759.47 for his efforts over that year. As the adjudicator's improper actions had necessitated the hiring of a lawyer in the first place, I asked the Board to pay Mr. Temnoff's legal fees. I relied upon Section 100 of the Workers Compensation Act:

> The Board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses he has been put to by reason of or incidental to the contest ...

Although the Board has a discretion to pay such expenses, its policy to date has been simply never to pay legal fees. The Commissioners decided that they were not going to break with tradition in Mr. Temnoff's case. Never to allow an exception to a discretionary policy, no matter how compelling the circumstances, would mean that the Board was fettering its discretion and acting in a manner that was contrary to law. Moreover, such a policy is unjust because it results in the denial of meritorious claims. I pointed out that Mr. Temnoff's case was an exceptional one that merited such an exercise of discretion. The legal fees were reasonably incurred as the result of the negligent and improper action of the Board's own employee.

The final word of the Commissioners was that while they considered Mr. Temnoff's case to be exceptional, it was not exceptional in a way that justified Board payment of his legal fees.

More than three years has passed since his work injury, and Mr. Temnoff has been unable to return to work. He has not been receiving compensation. His appeal was heard recently, but no decision has been received to date. The lawyer is pressing for payment of his bill, but the Temnoff family is receiving welfare, and cannot afford to pay it.

Recommendation:

That the Board pay Mr. Temnoff's lawyer's bill in the amount of $759.47. (The amount has increased from my original recommendation because of more complete information as to the actual charges).

Anticipated Impact:

Payment of $759.47.

Mr. Michele Sorrenti

Catch - 22

Mr. Sorrenti's inability to jump through the appropriate bureaucratic hoops led to the denial of his workers' compensation claim. For over a year he was forced to subsist on income assistance until he was able to walk again.

Mr. Sorrenti's 1979 claim for lost wages was refused in part because he could not produce doctors' reports saying he had a back injury. To understand why he could not we have to go back to 1972.

Mr. Sorrenti's problems began when he suffered an injury to his back in June 1972 while working as a mechanic. New to the ways of his adopted Canadian homeland, Mr. Sorrenti failed to notify his employer of the incident until 10 months had passed. Nor did he mention to the doctor who treated him that the injury was work-related. Too much time had passed since the injury and the Board refused to accept responsibility for Mr. Sorrenti's back surgery, which became necessary in April, 1973. But it appears that this 1972 injury was the basis for his later back problems. Medical reports from his own physician and from the Workers' Compensation Board's Medical Advisor link his continuing problems to degenerative disc disease in his spine on the same side as his operation. However, because of Mr. Sorrenti's failure to report in time this 1972 injury was never accepted as a valid Workers' Compensation Board claim. However, this is not Mr. Sorrenti's current problem.

Mr. Sorrenti injured his back again on August 10, 1979 and had to stay off work until early 1981. His claim, which he submitted in time, was initially disallowed. He appealed to the boards of review and in January of 1981 the board of review determined that

Mr. Sorrenti "sustained an acute lumbosacral strain ... which was superimposed upon a pre-existing non-occupational back condition". The board of review recommended that the Board provide compensation for wage loss for the period August 11 to November 1, 1979 and medical aid benefits for the period August 14 to November 16, 1979. November 16, 1979, was the last day for which a doctor's report existed.

Mr. Sorrenti, who had been unable to work following his August 10, 1979 accident until sometime early in 1981, appealed the board of review decision to the Commissioners. He felt that he should have received compensation for all of his time off work. The problem was that Mr. Sorrenti had failed to see a doctor about his condition between November 16, 1979 and December 10, 1980. Without continuing medical reports supporting his claim the Commissioners could find no basis for extending his award beyond November 16, 1979.

Mr. Sorrenti found himself in a "Catch-22" situation. At the time of his injury (August 10, 1979) there was no indication that the Board would accept responsibility for this claim or the medical cost associated with it. Indeed the claim was at first denied by the Board until the board of review decision over a year later. In the meantime Mr. Sorrenti had no medical coverage and no income. He already owed his doctor almost $1,000.00 for other services performed. Consequently, Mr. Sorrenti chose to suffer in silence during this period of time rather than incur further medical expenses, which he could not afford. As it turned out, without such visits to the doctor he was not able to support his claim. He had to seek provincial income assistance to maintain himself and his family.

Other persons (not doctors) gave me testimony as to Mr. Sorrenti's continuing disability. These were friends and neighbours who had contact with Mr. Sorrenti during his time off work. All agreed that

Mr. Sorrenti's back condition was seen to be painful and debilitating. I recommended that the Board accept Mr. Sorrenti's claim. The Board, however, felt that these statements were too uncertain to provide a proper basis for determing the extent of any disability that might have existed. The Board refused to pay further compensation. The Board said it could not conjecture about a workman's disability even on the basis of sympathy.

I am not asking for any consideration of sympathy in Mr. Sorrenti's case. The available evidence supports his claim. If evidence is missing, it is at least in part due to the Board's initial error in rejecting the claim and placing an undue burden of proof on Mr. Sorrenti.

Recommendation:

That the Board accept Mr. Sorrenti's claim for his 1979 back injury from November 16, 1979 to December 10, 1980.

Anticipated Impact:

Payment of about one year's wage loss benefits.

Mr. Stanley McKay

Defeated by a Technicality

Confusion about the correct way to report his injury led to the rejection of Stanley McKay's otherwise valid claim.

In December 1978, Mr. McKay was injured at work when he slipped on a piece of electrical conduit and fell heavily on his left side. This injury caused an aggravation of a pre-existing condition (in 1972 he had a total left hip replacement) and resulted in numerous operations. The Board did not receive Mr. McKay's application for compensation until February 1980. This application was rejected because it was submitted outside the one year limitation period.

Following the Board's refusal of this claim, things went rapidly downhill for Mr. McKay. His health deteriorated. His family life was disrupted. With no income and being unable to work, he was forced to liquidate his assets and then seek income assistance.

The circumstances of Mr. McKay's case are quite unique. In January 1979, Mr. McKay filled out a compensation form and left it with his supervisor as he thought he was required to do. The supervisor was supposed to submit Mr. McKay's and the company's application to the Board. It was not until October 1979 that Mr. McKay discovered that his application had not been submitted to the Board. However, since he was under the mistaken impression that an application for compensation must be submitted through a worker's supervisor, he attempted to track him down so that he could submit another application. Unfortunately, he was not able to locate the supervisor, who had been transferred, until February 1980. At that time a new compensation application was submitted for Mr. McKay. Mr. McKay's story is confirmed by a letter from the supervisor dated August 19, 1981 which states:

> He came after the Christmas and New Year's holidays to pick up his tools and discussed the matter with me and requested that I submit a report to the W.C.B., I agreed to do this, however, I said I didn't have time at the present but I would fill it out later. Somehow or another we became busy and I was transferred to another project in Victoria in February and in the process the letter became forgotten... There was a form made out at the time. It must have been lost or misplaced.

One of the reasons for Mr. McKay's initial lack of concern about his workers' compensation benefits related to his mistaken belief that his company's private insurance would cover the entire period of his disability. He was not initially aware of the seriousness of his injury.

In response to my recommendation, the Commissioners stated that they found it difficult to attribute the failure of Mr. McKay to apply to the fact that the supervisor had failed to make a report. Since Mr. McKay had previous compensation claims, the Commissioners felt he had a general awareness of the procedural requirements for a claim. In their opinion he should have pursued the matter further when he received no benefits or notification from the Board regarding his claim.

Furthermore, in order to utilize their statutory discretion for an extension of time, their policy required that there must first exist special circumstances which precluded the filing of an application. In this particular case it was their opinion that such special circumstances did not exist. The Commissioners stated that the fact that the claimant had an otherwise meritorious claim could not be said to be a special circumstance justifying the use of their statutory discretion. In my opinion, the supervisor's loss of Mr. McKay's initial application was a special circumstance sufficient to justify the Commissioners' extension of the filing

limitation period. Once the Commissioners decide that special circumstances exist, Board policy allows a "very wide discretion to accept claims regardless of how tardy the application".

The Board initially felt that the supervisor's statement of August 19, 1981 was ambiguous concerning whether Mr. McKay had actually submitted his compensation application to him to be submitted to the Board. As a result I received a further statement from the supervisor confirming this information. However, this was still not enough to convince the Commissioners. It was their opinion that from the time Mr. McKay was aware that his application had not been submitted he still had time to submit a second application before the one year time period expired. However, as stated earlier, Mr. McKay held the erroneous belief that he could only submit another application through the supervisor. Following his previous accidents he had submitted his compensation applications through his supervisor. He regarded this as a necessary step in applying for compensation. This mistaken belief should not disentitle Mr. McKay to his rightful compensation benefits.

Section 99 of the Act requires the Board to decide "according to the merits and justice of the case". In my opinion, the Board has failed to observe the spirit of this provision in Mr. McKay's case.

(I addressed the problem of valid claims being denied because of a breach of technical requirements in my first Special Report on the Workers' Compensation Board: Special Report No. 8 to the Legislative Assembly of B.C., April 1984, Case No. 4)

As a result of a further operation his health problems were finally overcome, and Mr. McKay, I am happy to say, is now getting back on his feet.

Recommendation:

That the Board allow Mr. McKay an extension of time to file his application.

Anticipated Impact:

Payment of Mr. McKay's claim.

Mr. Harold Berrow

No Compensation for Small Business Owner

The Board's collection practices result in harsher treatment of workers who own their own business than it does for employees of larger enterprises. Mr. Berrow has felt the brunt of these practices. The Board held back Mr. Berrow's wage loss benefits for two weeks, since he is the principal owner of a small limited company. The company had not paid the Board its first quarter's assessment. It was my opinion that the Board's refusal to pay Mr. Berrow's wage loss benefits until his company had paid its first quarter's assessment was oppressive. An authority acts oppressively when it uses its superior position or knowledge to place the citizen at an unreasonable disadvantage. As a worker, Mr. Berrow was entitled to payment of wage loss benefits. Such benefits take the place of lost livelihood, which a worker ought not be deprived of for the purpose of enforcing a debt to the Board in a matter unrelated to his claim.

The Commissioners responded to my recommendation by stating that it is the Board's practice, if a small limited company does not pay its assessment liability, to deduct the amount owed by the company from wage loss benefits payable to the principal. In Mr. Berrow's case the Board was simply giving him the opportunity to pay his outstanding assessment before it deducted the amount owing from his wage loss benefits. It was the Commissioners' opinion that it was fairer to give the principal an opportunity of this nature rather than simply deduct the amount owing without warning. Furthermore, the Board stated, since assessment money is a source of compensation benefits, it was not reasonable to other employees to allow company principals to be paid full benefits when their company has an outstanding assessment liability.

I responded that in my view an injured worker should not be treated differently just because he is also principal of the employer company. The two are legally separate. (I recommended that the Board observe this principle in my first Special Report on the Workers' Compensation Board: Special Report No. 8, April 1984, Case No. 7.) However, since the Commissioners stated they did not withhold wage loss benefits (as opposed to long-term pensions) as a technique for forcing employers to pay outstanding assessments, I modified my recommendation. It was my new recommendation that the Board should not attach a worker's benefits to recover his company's outstanding assessment debt until the collection remedies enumerated in Division 4 of the Act had been unsuccessfully pursued. These are (i) suing in court, and (ii) filing a certificate of the debt in court.

The Board disagreed with my recommendation. It said that my proposal would result in the Board paying money out with one hand and attempting to collect an assessment owed with the other. In my opinion, the same would be true if Mr. Berrow worked for a large corporation that had failed to pay its assessments.

It is my opinion that the entitlement of a worker to wage loss benefits and the Assessment Department's collection of assessment debts are two separate matters altogether and should be kept separate. The Board's practice treats small businesses more harshly than large companies and their employees and is improperly discriminatory.

Recommendation:

That the Board adopt the practice of not attaching a worker's benefits to recover his company's outstanding assessment debt until the other available collection remedies have been unsuccessfully pursued.

Anticipated Impact:

Unfair shortcuts to collecting outstanding assessments would be eliminated.

Mr. John Rahn and Mr. William Relkoff

The "Dual System"

The Board has a choice of two methods of calculating the value of an injured worker's disability--1. the physical impairment method and 2. the loss of earnings method. The worker is usually awarded the larger sum produced by these two calculations. The first method is based on a list of percentages of total disability assigned to the loss of use of particular parts of the body. Under the second method the Board measures disability by awarding 75% of the difference between the worker's average earnings prior to the injury and the average amount he is able to earn after the injury. The process of making both calculations and awarding the higher amount is called "the dual system" by the Board.

Similar provisions in workers' compensation legislation have been in effect since 1943, and in that year the provisions were made retroactive to 1917. However, despite the legislation, the Board did not institute a "dual system" policy until 1973 (and then for spinal injuries only). The "dual system" was extended in 1977 to other types of injuries. Until then only the physical impairment method was used to calculate awards.

I have investigated two cases in which the Board's failure to exercise its discretion to apply the loss of earnings method prior to 1973 may have adversely affected claimants, as their pensions were calculated only according to the physical impairment method and no consideration was given to their actual loss of earnings.

One such worker is Mr. Rahn, who suffered a back strain at work in 1951, while working as a faller and bucker. In 1955 and 1958 Mr. Rahn underwent back surgery and was awarded a pension by the

Board. After this operation, Mr. Rahn changed his occupation to that of light mechanical work and stated that his income was reduced by more than 50% as a result.

Mr. Rahn's pension was based on a functional award of 7.5% of total disability and the Board did not consider his reported loss of earnings as a result of his injury. Because of my recommendation, the Board agreed to assess Mr. Rahn's pension under the loss of earnings method as of 1973 when the "dual system" (for spinal disabilities) came into effect. However, the Board refused to assess his pension under this method beyond 1973.

Another complainant, Mr. Relkoff, was severely injured at work in 1945 in a logging accident when he was 21 years old. This accident resulted in leg, vision and hearing disabilities. In 1948 he was injured in a second logging accident. The Board awarded him a pension for his injuries. However, after the second accident Mr. Relkoff was not able to return to logging and instead operated a grocery store with his wife for many years, and worked as a security guard for two years. He has been on a Handicapped Persons Income Allowance from the Ministry of Human Resources since 1973. The Board did not consider, in awarding Mr. Relkoff a pension, whether he had suffered a loss of earnings as a result of his injury, as provided by the legislation.

I found that the Board's failure to make and choose between the two calculations when determining the amounts of Mr. Rahn's and Mr. Relkoff's pension awards was contrary to law. The Workers Compensation Act requires the Board to make a genuine choice. Its failure to consider both alternatives and choose one constituted an unlawful fettering of the Board's discretion. I recommended that the Board reconsider Mr. Rahn's and Mr. Relkoff's pension awards taking into account the two methods of calculating awards.

The Commissioners replied that when the Workers Compensation Act is changed, or the Board alters its previous practice so as to increase the benefits payable to workers, the question always arises as to whether the change should be made retroactive or should only apply after a certain date. The Commissioners felt that as the previous claims were properly dealt with on the basis of the law and practice as it then was, it cannot be said that claimants have been dealt with unfairly. They stated that there would be enormous practical problems and costs associated with continually changing old decisions in light of changing practices and laws.

I pointed out, contrary to the Board's claim, that in these cases the law had not changed since the claimants were awarded their functional pensions, but rather it has been the Board's practice or policy that has changed. Policies must follow the law. Therefore, I do not see why these claimants should be treated any differently from a person who was assessed for a pension after the Board adopted a new policy. In my view the complainants had been treated unfairly because, although their claims were dealt with on the basis of the practice as it then was, the practice did not conform with the law.

The Commissioners also objected to my recommendation on the ground that no exception could be made in an individual case without also doing the same for all persons receiving spinal pensions at the time the dual system was introduced. My response to this is that the impossibility of doing justice for every claimant in a particular class cannot justify the refusal to do justice for any of them.

Recommendation:

That the Board reconsider Mr. Rahn's and Mr. Relkoff's pension awards under the "dual system" of calculating awards.

Anticipated Impact:

Payment of increased pensions to Mr. Rahn and Mr. Relkoff.

Mr. Warren Ross

Correcting an Old Error

The worker who believes that his claim has been unfairly denied is left with a sense of injustice that does not readily dissipate; and that worker will try to seize every possible opportunity to have that perceived injustice corrected - months, years, even decades after the precipitating event.

Mr. Ross reported an injury while employed at the Elk Falls Company Ltd. pulp mill in Campbell River on December 29, 1966. He felt a pain in his lower back when he pulled a short block off a loading conveyor with a picaroon while leaning over a waist-high railing. He received heat treatment for twenty minutes at the first aid station and returned to a different job for the remainder of the shift. Mr. Ross was unable to report to work the following day because of pain and stiffness in his back. His doctor referred him to the Campbell River General Hospital, where he remained until January 13, 1967. His doctor indicated that Mr. Ross was able to resume his usual employment as of April 1, 1967.

The Board denied Mr. Ross' claim in a letter dated February 2, 1967. The adjudicator wrote:

> ... it would appear that you were doing your normal work and as nothing unusual has been described as occurring it is our opinion that this work activity on December 29, 1966, was not responsible for the back disability for which you complained and sought medical attention.

Mr. Ross' claim was considered by a Board of Review on August 23, 1973. In a letter of that date the Chairman of the Board of Review stated:

> It should be pointed out that at the time your claim was initiated, the Workman's Compensation Act only authorized compensation for "personal injury by accident." [original emphasis] The Board has advised you on different occasions that you have not established entitlement in accordance with this requirement.

The Commissioners confirmed the decisions of the Claims Department and Board of Review.

In January 1983, Mr. Ross' legal aid advisor submitted a request for the Commissioners to reconsider his file. She argued that the Board of Review erred in law in 1973 when it took the position that Mr. Ross' claim should be denied because no specific accident had occurred at the time of Mr. Ross' injury.

The Commissioners agreed with this argument. However, they also noted that Mr. Ross' claim was denied in 1967 because the Board adjudicator decided that Mr. Ross' injury did not result from his work. Since the original decisions on the claim were not based on an error of law, they concluded that these decisions could only be reviewed by the Commissioners if new evidence was submitted in support of Mr. Ross' claim. Since no new evidence had been submitted, the review was dismissed and the denial of Mr. Ross' claim was upheld.

After investigation, I found that the evidence supported Mr. Ross' claim that his back problems resulted from his work. The pain developed while he was at work and was reported to the employer. On all occasions Mr. Ross was working as a loaderman in the Groundwood Department which involves the lifting and pulling strain to the back. Mr. Ross reported back pains on several occasions but made no claim for compensation until after the final injury on December 29,

1966. Mr. Ross' previous back complaints are consistent with a condition which developed over time as the result of work-required motion.

The Commissioners responded to my Preliminary Report stating:

> There is no dispute that Mr. Ross suffered an onset of back complaints while at work. The question at issue is whether those complaints resulted from his work. The Board denied his claim on the basis that at the time in question he was doing his normal work and nothing unusual occurred. It appears to the Commissioners that this decision was basically one of judgment reached by the Board at the time and can see no grounds for their reconsidering it.

I argued that certain jobs could result in injury by the performance of certain work required motions. The Commissioners had recognized this principle when they set down Reporter Decision #145. However, the position of the present Commissioners on this point was:

> It does not seem to the Commissioners that the Board's policies of today should be used as criteria for reconsidering Board decisions made when the same policies were not in effect. A decision can only be judged on the basis of the law and policy in effect when it is made. The Commissioners consider that the decision on Mr. Ross' claim was reasonable by the standards of the time and should, therefore, be left unchanged.

In my view Mr. Ross' injury arose out of and in the course of his employment. The accident which caused Mr. Ross' injury was identified. It occurred at work. There is no evidence in the claim file to contradict the presumption that because the accident occurred in the course of the employment, it arose out of the employment. Even if a specific incident or accident could not be

identified, the evidence supports the conclusion that on the balance of probabilities Mr. Ross suffered a compensable injury on December 29, 1966.

The Commissioners objected that I was simply reweighing the evidence and substituting my judgment for that of the Board. They contended that the Board had made a legitimate decision to deny this claim for which there was supporting evidence and which was in accordance with the practice and policy of the time. The Commissioners maintained that I had provided no grounds which would justify a change in that decision and thus the disallowance of this claim would be maintained.

In my view it is not good enough to deny justice simply because it was acceptable to do so at the time the decision was made. If we can correct erroneous decisions, there is no good reason for refusing to do so. The Workers Compensation Act provides that the Board shall decide "according to the merits and justice of the case". The Board is also empowered to reconsider any of its previous decisions. In Mr. Ross' case justice requires that an erroneous decision be corrected, and the law allows the Board to do so.

Since the incident in 1966 Mr. Ross has had to engage in lighter, less well paying work, and has continued to experience problems with his lower back.

Recommendation:

That the Board accept Mr. Ross' claim.

Anticipated Impact:

Retroactive payment of Mr. Ross' claim.

Mr. John Gray

Policy not Applied

Sometimes I come across situations where people have to use their own money to pay for the consequences of a work injury when the consequences are really a Board responsibility. This was the case with Mr. Gray.

Prior to February 1980 Mr. Gray had no significant back problems. On February 25, 1980 he fell off a ladder and landed on his buttocks. His claim was accepted and he received wage loss. However, he developed persistent back complaints, and a defect of the vertebrae was ultimately diagnosed in March 1982. Surgical treatment was recommended by his orthopedic specialist. The Board refused to accept responsibility for this surgery and held that the need for the surgery was due to a pre-existing condition. Mr. Gray underwent surgery in September 1982 and he was unavailable for work due to post-operative recovery for six months. During this time the family cashed in their RRSP and other savings in order to keep their house. Mr. Gray now reports only minor stiffness and considers the operation a success.

Mr. Gray complained that the Board should have compensated him for his surgery and for the period he was unable to work due to convalescence from the surgery. I recommended to the Board that Mr. Gray's claim be accepted. I based my recommendation on Section 14:10 of the Board's Claims Adjudication Manual. This Section states that it is not normal Board policy to pay compensation in respect of a surgical operation without also accepting the condition which leads to it, which would seem to disqualify Mr. Gray. However, an exception to this is where a worker with a serious non-compensable pre-existing condition suffers

a minor work injury which aggravates that condition. The apparent purpose of this Section is to cover a situation in which an injury may cause an onset of symptoms which, though primarily caused by the underlying condition, would not have been felt at that time without the injury. In this kind of situation, where the injury had "triggered" the immediate symptoms following the injury, the Board may authorize the surgery and pay for a reasonable period of post-operative recovery. I also pointed out that Mr. Gray's pre-existing condition became symptomatic as a result of the trauma of the work injury.

The Commissioners maintained that the surgery was not necessitated by the 1980 injury and therefore the "triggering" policy has no application. On this point the Board is clearly wrong. If the 1980 injury had never happened Mr. Gray would not have required surgery to correct this underlying condition.

Following my report to Cabinet, I discussed this case further with the Chairman of the Workers' Compensation Board. No change resulted.

Recommendation:

That the Board accept Mr. Gray's claim.

Anticipated Impact:

Payment of Mr. Gray's claim.

Mr. Albert Pipke

Disabling Allergy

Mr. Pipke worked as an auto mechanic for thirty-four years. During his later years of employment he developed headaches and blurring of vision which were eventually attributed to exposure to carbon monoxide fumes at his place of work. Therefore he was forced to take the only logical course of action - he resigned. However, no comparable work was available to him, and at sixty years of age Mr. Pipke could not be considered a good candidate for an industrial apprenticeship in some other field. Yet the Workers' Compensation Board does not consider him to be disabled.

Mr. Pipke was forced to engage in a fruitless and frustrating search for work for two years after his turn-down by the Board. During that period he had to use a considerable portion of the savings he and his wife had put aside for retirement. A heart attack then ended his job seeking efforts; he now subsists on a veteran's disability pension.

This case is tragically similar to that of Mr. Emery. In Special Report No. 8 to the Legislative Assembly on the Workers' Compensation Board, I outlined the case of Mr. Emery, a sheet metal worker who late in his career developed an acute allergic skin reaction to chromates - the substance which coated the sheet metal with which he worked. With limited education and no training in any other industrial skill area, Mr. Emery was unable to find comparable employment away from the irritant. However, the Board would neither consider him for a permanent partial disability award, nor, because of his age, would the Board enrol him in an appropriate retraining course. The Board's definition of disability did not cover Mr. Emery's condition.

In Mr. Pipke's case I could only repeat the recommendation that I had made in the earlier situation - that the full range of compensation be available for workers who develop allergic industrial diseases. I reiterated that this would not necessarily mean a pension in every case; many workers would be able to find suitable alternate employment - especially if retraining was offered by the Board. But in cases such as Mr. Emery's and Mr. Pipke's a pension would remedy the severe injustice which resulted from the Board's present limited view of what constitutes a work-related disability.

The Board agreed with me to this extent - they would have their Rehabilitation Consultants make special efforts to assist workers caught in this predicament. But the Board would not budge on the pension issue.

Recommendation:

i. That the Board recognize disabling allergies as compensable disabilities.

ii. That the Board accept Mr. Pipke's claim.

Anticipated Impact:

Increased pension costs for workers who suffer disabling industrial allergies and who cannot be re-trained.

Mr. Dale Jones

Onset of Symptoms Delayed

Not every case is clear-cut. In some cases the Board has to make a judgment call. When that judgment is later proved to be wrong, however, the Board sometimes refuses to change its decision. Mr. Jones' is such a case.

Mr. Jones was working as a buckerman in a logging area some 80 miles west of his residence. He was picked up early one morning by a fellow employee in a company truck and headed off to work. Before leaving he loaded three power saws, a five gallon gas can, a tool box, clothing and other supplies for a weeks' stay at the logging camp. Later he transferred this gear to another company truck. He did this while standing on the ground by swinging each item up over the respective tail-gates, which were left in upright position, into the box of the second truck. The gas cans weighed roughly 35 pounds each. The tool box weighed in excess of 50 pounds.

After three to four hours the worker noted a developing pain in the lower back and upper thigh area. He did not report this as he ascribed it to a pulled muscle. He mentioned the pain later that evening to another worker. However, he felt that a hot shower and a night's rest would resolve what he thought was a muscle strain.

The following morning this worker noted no specific pain upon arising. However, after just a short period of work the pain increased in intensity until just prior to noon when the worker reported the pain to the foreman and explained that he would not be able to carry on. Arrangements were made by radio-phone for the worker to see a chiropractor in a nearby town at 4:00 p.m. that

day. The problem was diagnosed as a pinched nerve and misalignment of the lower back. Eventually the condition was diagnosed further as left low lumbar disc disease. Mr. Jones was treated for this condition for approximately one year following the incident. Although he is now working once again, Mr. Jones has continued to have some difficulties with his back.

The worker's claim for compensation was denied by the claims adjudicator on the basis that the injury related to an incident which took place before his work shift began. This decision was upheld by the boards of review on the basis that there was insufficient evidence that the injury occurred as a result of work related activities. When the matter was appealed to the Commissioners, the Commissioners concluded that the claim should not be allowed in view of the length of time between the incident, onset of symptoms, and the seeking of treatment.

It should be noted that the worker had no history of previous back problems, nor did x-rays reveal any degenerative condition of his spine.

Under the circumstances it appeared to me that the Commissioners may have erred in concluding that the time separation between the work incident, the symptoms, and the treatment was too great, particularly in view of the fact that back injuries do not always develop immediately after the occurrence of the incident which causes them. I therefore recommended to the Commissioners that they apply Section 99 of the Workers Compensation Act to this situation and accept the claim for compensation. I was supported in my position by a comment by the worker's doctor that it is very common for patients to have a delay in the onset of symptoms and that this delay can range from a few hours to a few days.

The Commissioners maintained that consideration of the significance of a delay involves an exercise of judgment and they can see no reason why my judgment of the matter should be preferred to that of the Board. This response did not answer my criticism. The Commissioners were not able to say why my judgment was not acceptable. I pointed out clearly where the Commissioners had erred and why. They chose not to answer my arguments. My criticism and my recommendation stand.

Recommendation:

That the Board accept Mr. Jones' claim.

Anticipated Impact:

Payment of Mr. Jones' claim.

APPENDIX A

Summary of Recommendations

Case No. 1 - Mr. Ben Temnoff

That the Board pay Mr. Temnoff's lawyer's bill in the amount of $759.47.

Case No. 2 - Mr. Michele Sorrenti

That the Board allow Mr. McKay an extension of time to file his application.

Case No. 3 - Mr. Stanley McKay

That the Board adopt the practice of not attaching a worker's benefits to recover his company's outstanding assessment debt until the other available collection remedies have been unsuccessfully pursued.

Case No. 5 - Mr. John Rahn and Mr. William Relkoff

That the board reconsider Mr. Rahn's and Mr. Relkoff's pension awards under the "dual system" of calculating awards.

Case No. 6 - Mr. Warren Ross

That the Board accept Mr. Ross' claim.

Case No. 7 - Mr. John Gray

That the Board accept Mr. Gray's claim.

Case No. 8 - Mr. Albert Pipke

i. That the Board recognize disabling allergies as compensable disabilities.

ii. That the Board accept Mr. Pipke's claim.

Case No. 9 - Mr. Dale Jones

That the Board accept Mr. Jones' claim.

Volume

2

OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 12

to

The Legislative Assembly of British Columbia

THE WORKERS' COMPENSATION BOARD (No.2)

VOLUME 2

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Legislative Assembly
Province of British Co .bia

OMBUDSMAN

202, 1275 West Sixth Avenue
Vancouver
British Columbia
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Telephone: (604) 736-3021

000001

File: 83-50984

May 25, 1983

Mr. [redacted]
Workers' Compensation Board
3306-32nd Avenue
Vernon
B.C.
V1T 2M6

Dear Mr. [redacted]:

Re: Mr. B. Temnoff

Pursuant to Section 16 of the Ombudsman Act, I am enclosing a copy of our findings in Mr. Temnoff's complaint. If you should have any questions or comments please do not hesitate to contact Isabel Otter of my Vancouver office.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

Legislative Assembly
of British Columbia

Office of the
Ombudsman

202, 1275 West Sixth Avenue
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000002

File: 83-50984

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaint of Mr. Ben Temnoff

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

FINDINGS

of the Ombudsman concerning a complaint against the Workers' Compensation Board by Mr. Ben Temnoff.

Background

Mr. Temnoff was a machinist, employed by the same Vernon company for approximately 7 years. On January 6th and 7th, 1982, he was repairing a 100 ton press, part of which had jammed. Heavy exertion was needed, and as the task progressed he noticed pain and stiffness in his right arm which increased to the point where he could no longer bend his right elbow.

His physician diagnosed bicipital tendinitis at the point of insertion on the right elbow, and it was expected that a week or two of rest would be needed for recovery. A week later, the physician noted that the pain was following the route of the ulnar nerve, going from the right side of Mr. Temnoff's neck down to the fourth and fifth fingers of his right hand. Physiotherapy was started soon afterwards, and the orthopaedic surgeon that he was referred to suggested a diagnosis of extensor tendinitis and ulnar neuritis. Anaprox, an anti-inflammatory medication, was prescribed, and the expected recovery period was extended to several weeks.

By March of 1982 Mr. Temnoff had developed a duodenal ulcer which was presumed to be due to the Anaprox. The drug was discontinued and Tagamet was prescribed instead. In late April, he was admitted to the Richmond Rehabilitation Clinic for intensive physiotherapy, as his arm had still not recovered.

In early May, while doing exercises at the Clinic, Mr. Temnoff strained his cervical and dorsal spine, and needed treatment for the pain from the emergency department of a nearby hospital. Following this, some numbness of his right side was reported, as well as pain in his back and continuing problems in his right arm. The health professionals treating him mentioned apprehensiveness and tension on his part, which, they felt, could only exacerbate his physical problems. By the end of May it was noted that he had become severely depressed and preoccupied with his pains and disabilities, which had not appreciably decreased, so he was discharged home for counselling and further physiotherapy. At this point, Mr. Temnoff was still receiving wage loss compensation.

In a letter dated June 14, 1982, from Mr. [redacted] Claims Adjudicator in the Vernon office, Mr. Temnoff was told that his wage loss payments had been retroactively stopped. While it was not explicitly so stated, the intent of the letter was apparently to suspend rather than terminate wage loss payments. (This is also the interpretation chosen by the Chairman of the Workers' Compensation Board, as indicated by his April 11, 1983 letter on Mr. Temnoff's file.)

The adjudicator wrote to Mr. Temnoff:

> "In view of recent medical information on file, it is apparent that your right arm injury of January 6, 1982, is not the major cause of your problems delaying your return to work. With this information in mind, I would inform you that wage loss benefits on your claim will be concluded as of June 6, 1982. No further benefits will be issued on your claim until conclusive proof of medical disability relating specifically to your right arm injury has been received and reviewed by us."

Mr. [redacted] made no mention, then or later, of any possible appeal from this suspension, and Mr. Temnoff's subsequent actions have been based upon the understanding that he had no recourse until a decision was made to terminate his benefits. (I am not sure that he was given the correct information. More recent board correspondence on an unrelated matter has indicated that suspensions may be appealed. I would certainly appreciate clarification on this issue.)

On the same day as the suspension Mr. [redacted] took a statement under oath from an Edgewood resident. The gist of the statement was that Mr. Temnoff had been seen gathering firewood for his personal use in mid-April of 1982. On two different days he had been observed loading his van with no obvious difficulty, cutting the pieces with his chainsaw first if they were too long to handle easily. At that time Mr. Temnoff had apparently also complained about an unsuccessful earlier attempt which had produced wood too tough for him to split.

Although Mr. [redacted] has given Mr. Temnoff nothing in writing regarding this allegation and its implications, he has spoken to both him and his lawyer, as well as my assistant, about the possibility of Mr. Temnoff being charged with fraud because of it. Unfortunately, he does not appear to have given everyone consistent versions of the possible offence, and none of those oral descriptions completely match the circumstances outlined in the above statement.

Recent Decisions:

None. At the time of writing, Mr. Temnoff has waited almost a year for a decision by his adjudicator regarding termination or reinstatement of his wage loss benefits.

Employer's Involvement:

As there is no indication on file that Mr. Temnoff's employer objects to his claim, the company has not been notified.

Complaint

1. That Mr. Temnoff is unable to address the concerns of his adjudicator because he has been given insufficient and contradictory information as to exactly what those concerns might be.

2. That Mr. Temnoff's adjudicator has made no decision about the wage loss payments as of this date. In combination with the first complaint, this failure to come to a definitive conclusion has effectively isolated Mr. Temnoff from any appeal.

3. That a decision on Mr. Temnoff's wage loss payments has been unreasonably delayed, resulting in financial hardship and considerable personal and marital stress.

4. Mr. Temnoff and his lawyer also feel that the adjudicator's behaviour has been unprofessional in that he has allowed negative personal feelings about the claimant to interfere with his adjudication of the claim (paraphrased from the March 23, 1983 letter written to the Chairman of the Workers' Compensation Board by Mr. Temnoff's lawyer).

Issues:

1. Was the suspension of Mr. Temnoff's wage loss payments valid?

2. Has adjudication of Mr. Temnoff's claim been delayed?

3. Has the delay been related to the application of an unreasonable procedure?

Grounds for Adverse Findings:

The ambiguity of the procedure by which Mr. Temnoff's benefits were stopped has already been mentioned, but, with hindsight, it seems reasonable to assume that the procedure was intended to be a suspension. The reason for this suspension was, according to Mr. [redacted]'s letter of June 14, 1982, that the original injury was no longer the major (my emphasis) cause of continuing disability, thus necessitating the acquisition of more medical information.

I have examined the Workers Compensation Act and the Board's Training Notes for policy statements regarding suspensions. The reason given by Mr. [redacted] does not fall within any of the guidelines that could justify such an action.

Furthermore, the Training Notes warn the adjudicator:

> It should also be clear that a decision to suspend payments is a last resort and the administration of the process should reflect that understanding. (Training Session #112)

Mr. Temnoff's adjudicator has also indicated a second area of concern. Orally, he has stated that Mr. Temnoff was physically able to work while he was receiving wage loss compensation.

Given those concerns, the contents of Mr. Temnoff's file at the Board are somewhat surprising. The bulk of the file is taken up with medical reports from both Board and private doctors. There are no written reports from Mr. [redacted] regarding his conversations about fraud charges and no written reports regarding evaluation of the evidence in that context either. There is no reasoning on file leading up to the decision to suspend benefits, no evidence of an effort to collect the relevant (but apparently missing) medical data before or after suspension, and no indication as to exactly what gaps such data might be expected to fill. There is no evaluation of Mr. Temnoff's previous injuries and their relevance, if any, to his present one. There is no demonstrated interest in the injuries that he acquired during his 1982 treatment period - his ulcer and his back problems.

There is no documentation of a February 25, 1983 group meeting that my assistant was informed of (by Mr. [redacted]) which was supposed to make an interim adjudication either reinstating or ending Mr. Temnoff's wage loss payments. Nor is there anything on file regarding any follow-up to such a meeting. Yet Mr. Temnoff describes being initially told by Mr. [redacted] that the group decision had been to reinstate wage loss, although later (on March 8) Mr. Temnoff was told by Mr. [redacted] that this decision had been countermanded by "the boss" in Vernon.

The file contains virtually no adjudicator input whatsoever. It does contain two quality control memos from September 1982 and January 1983 which are critical of the delay and lack of documentation. (The role of the quality control team is both educational and corrective for Board employees. It randomly reviews decisions and also provides comparative data regarding staff performance.) The most recent correspondence on file is from the Chairman of the Workers' Compensation Board. He acknowledges, to Mr. Temnoff's lawyer, that the claim had not been handled quickly, and that "service does not appear to be as good as it should have been".

As the file gives little indication of any sequence of thought and events, it is worth examining what Mr. Temnoff perceived to be happening.

When he was first notified of wage loss suspension, Mr. Temnoff asked Legal Aid for assistance in straightening out the claim, as he felt, from past unpleasant experiences with the Board, that this would be the best route to follow. Legal Aid obliged, and, through contact with Mr. [redacted], apparently dealt with a succession of concerns that were raised, such as whether or not Mr. Temnoff was actually suffering from arthritis, whether he had been a temporary or permanent employee, and whether or not his back problems were chronic rather than recent.

Mr. Temnoff believes that it was sometime in July of 1982 when the Legal Aid assistant was first notified of the possible fraud charges. Shortly afterward, Mr. [redacted] told Mr. Temnoff that he had been seen working six to eight hours a day in the bush for a two week period during the late winter of 1982. At this point Mr. Temnoff decided that he should hire a lawyer privately, and retained Mr. F[redacted], who has since acted on his behalf. Mr. F[redacted] March 23, 1983 letter on Mr. Temnoff's file outlines the efforts that he has put toward his client's claim to date, by way of meetings, phone calls and letters, in his attempts to ascertain and meet Mr. [redacted]'s concerns.

In view of the admissions on the part of the Board, it would hardly be controversial for me to find that unreasonable delay has indeed occurred in Mr. Temnoff's case. Our concern therefore moves on to why such a delay happened, how similar delays might be prevented from recurring, and whether, at this point, any decision at all (for or against his claim) could adequately meet the needs of Mr. Temnoff.

The sparseness of adjudicative input combined with the already conceded unreasonable delay should make anyone suspect that the major problem has been the quality of the adjudication. For reasons that must be obvious, a final determination should be made as rapidly as possible once a decision has been made to suspend wage loss payments. In Mr. Temnoff's case not only was there delay on Mr. [redacted]'s part in coming to a conclusion, he also placed the onus of investigation onto the claimant by expecting him to produce the medical information that would causally relate the ongoing disabilities to the original work injury. If Mr. Temnoff were appealing a negative Board decision he should be expected to show initiative in finding and organizing supportive opinions. But until such a decision is made, the presumption is not that the injured worker should, at his own expense, have to build a case proving his eligibility for compensation. It is up to the Board to investigate the claim and seek the relevant medical opinions. This is a basic principle of workers' compensation, and described in Reporter Decisions #52 and #286.

The references that Mr. [redacted] made to Mr. Temnoff, his lawyer and my assistant about possible fraud charges also concern me. One assumes that such a subject would only be raised if it were being given serious consideration, but the file contains no evaluation of the available evidence and its implications, no mention of any conversations on the subject, and no acknowledgement by Mr. [redacted] that he was even considering such an action. As I understand it, the recognized procedure at the Board is that possible frauds are forwarded to a field investigator for closer examination, but there is no indication on the file that this was ever done either.

The effect of these months of stress, frustration and financial hardship can be imagined but not so easily measured. What Mr. Temnoff has described to my assistant goes beyond the obvious problems of a family with three children coping on welfare instead of his previous wage of $40,000 a year. Mr. Temnoff has described the deterioration of his marriage; his fears about the unknown functional future of his arm; his fear of being criminally charged with fraud; his frustration because he can only deny such a charge, not being given enough (accurate) details to dispute it effectively.

A decision in his favour, after all this time, would not, in Mr. Temnoff's view, bring his family relationship back to where it was and would not compensate them for the emotional and financial stresses that they have experienced.

On the basis of the foregoing, I may find that the complaint is substantiated on the following grounds:

1. The suspension of Mr. Temnoff's wage loss benefits was unjust because the decision was not supported by sufficient evidence.

2. There has been unreasonable delay in the investigation and determination of Mr. Temnoff's claim.

3. The failure of the Board to reach a decision in this case was related to the application of unreasonable procedures. The quality control procedures followed by the Board are not able to accomplish the purpose for which they were established, i.e. the identification and rectification of defects in adjudication such as the delays experienced in this case.

4. The adjudicator acted improperly by making idle threats to have Mr. Temnoff charged with fraud.

Possible Recommendations:

I have not yet reached a final conclusion on this complaint, and I would appreciate your comments on the grounds set out above. In order to assist you in focusing your response I am considering the following recommendations:

1. That Mr. Temnoff's claim be transferred immediately to another adjudicator.

2. That Mr. Temnoff's wage loss benefits be reinstated retroactive to June 6, 1982.

3. That the Workers' Compensation Board pay Mr. F[redacted] fee. He was initially retained because of indications that Mr. Temnoff would be criminally charged, and has spent a considerable length of time dealing with what now appears to have been a non-issue. Because the onus for proof of eligibility was shifted onto Mr. Temnoff, Mr. F[redacted] also assisted with the organization of supportive medical evidence. Had the Board's adjudication followed normal practice, the likelihood is that it would not have been necessary for Mr. Temnoff to engage Mr. F[redacted] to the extent that he did - if at all.

4. That the Board either expand the mandate of the quality control team or create some other means by which claimants can be "rescued" when it becomes apparent that needless delays or other improper procedures are occurring.

Karl A. Friedmann
Ombudsman
May 25, 1983

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

J. IO. 000010

OFFICE OF THE COMMISSIONERS

4 July 1983

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VANCOUVER

Legislative Assembly of
British Columbia
Office of the Ombudsman
#202 - 1275 West Sixth Avenue
Vancouver, B.C.
V6H 1A6

Attention: Karl A. Friedmann
Ombudsman

Dear Dr. Friedmann:

Re: Ben TEMNOFF
Claim No. LC82350055

Your letter received on May 30, 1983, has been considered by the Commissioners.

There are two main issues raised by you on this claim. These are:

1. The validity on the merits of Mr. [redacted]'s decisions of June 14, 1982, April 18, 1983, and June 1, 1983, which have the overall effect of terminating wage loss on June 6, 1982, and denying further responsibility for various continuing complaints.

2. The validity of Mr. [redacted]'s handling of the claim from a procedural and claims management point of view.

On the first of these issues, it appears to the Commissioners that Mr. [redacted]'s decisions on the merits are justifiable and supported by the evidence. They would refer you in particular to the reports of Mr. Temnoff's treatment at the Clinic from April 26 to June 1, 1982, Dr. Stanger's reports, Dr. O[redacted]'s report of February 1, 1983, Dr. N[redacted]'s report of May 13, 1983, and Dr. W[redacted]'s report of May 25, 1983. The claimant has a right of appeal to the board of review against Mr. [redacted]'s decisions which he is exercising. No further wage loss benefits can be paid to him unless and until he is successful on that appeal.

.../2

Most of your concerns seem to relate to the second issue outlined above. The Commissioners agree that there is cause for concern here. There was unreasonable delay in investigating and reaching a final decision on Mr. Temnoff's claim. There were reasons for much of the delay as set out in Mr. [redacted]'s memo of January 14, 1983; for example, in late 1982 Mr. [redacted] was waiting for information from Mr. F[redacted] and, in 1983, he was awaiting medical appointments. However, not all the delay can be explained and Mr. [redacted] was in any event probably too passive in accepting these delays. He certainly could have taken action of some kind to reduce the delay considerably. He should have taken greater initiative to investigate the matter himself and should not have appeared to throw the onus on to Mr. Temnoff.

The Commissioners also agree that Mr. [redacted] did not act properly when he failed to come to some kind of conclusion regarding his investigation into the question whether Mr. Temnoff was working while on wage loss benefits in early 1982. Having advised Mr. Temnoff of the information he had and of the possibility of prosecution, he should not have left the matter unresolved in the way he did. Mr. Temnoff was entitled to know the results of the investigation. The Commissioners would, however, question whether it is proper to characterize Mr. [redacted]'s actions in this respect as constituting "idle threats". He did have some evidence to justify an investigation and part of his job as a Claims Adjudicator is to advise claimants of information obtained which is adverse to their interests. There is no real evidence that Mr. [redacted] acted improperly in the manner of his notifying Mr. Temnoff of the information adverse to him.

As you note, the file was reviewed by the Quality Control Section of the Claims Department on two occasions and the delays in the handlings of the claim then noted. Yet, it did not appear to make any appreciable difference to the matter. The Quality Control Section has recently undergone certain changes which it is hoped will make it more effective and avoid a recurrence of this type of situation.

The Commissioners are not normally prepared to agree to a request from a claimant that there be a change in the Claims Adjudicator handling his claim. Claims Adjudicators are often required as part of their jobs to make decisions or tell claimants things with which they disagree and a

.../3

claimant will often request a change because of the nature of what the Claims Adjudicator has done rather than because there was any impropriety in the way in which he did it. However, because clearly Mr. [redacted] has committed procedural errors in the handling of Mr. Temnoff's case, the Commissioners agree that a change should be permitted in this case.

The Commissioners are unable to agree with your proposal that it pay Mr. F[redacted] fees. The Board's general policy is not to pay legal fees and they do not feel that the circumstances of Mr. Temnoff's case justify an exception. While some aspects of his case may be unusual, his situation was in essence no different from that of many other claimants dissatisfied with a decision of a Claims Adjudicator and forced to take action to obtain its reverse. Even if he could not appeal the June, 1982, decision to the board of review, it was open to him to complain of Mr. [redacted]'s actions to the Claims Department or to the Commissioners. Although you suggest that Mr. F[redacted] spent a lot of time on the potential criminal charges, Mr. F[redacted] letters to the Board do not appear to mention this. They seem to be directed solely at obtaining a change in the decisions on the claim. Since the Board's policy does allow for the payment of medical reports obtained by lawyers, the Commissioners are agreeable to paying for the reports obtained by Mr. F[redacted].

You have raised in connection with this claim the issue of suspending claims already under dicussion in connection with Mr. [redacted] claim. It appears to the Commissioners that it would confuse matters and be repetitive if this issue were to be dealt with separately on both claims. They therefore propose that discussion on this issue be confined to Mr. [redacted] claim. It cannot now in their view make a material difference to Mr. Temnoff.

In the result, the Commissioners are unable to agree that wage loss be paid for the period following June 6, 1982, unless and until Mr. Temnoff is successful on his appeal to the board of review. They agree that Mr. [redacted] was negligent in the manner of handling the claim and that the claim should for that reason be transferred to another Claims Adjudicator. They do not agree to pay Mr. F[redacted] legal fees, but will pay for the medical reports obtained by him. The Quality Control Section has already been recrganized

in a fashion which, it is hoped, will make it more effective.

Yours truly,

N.C. ATTEWELL
Secretary to the Board

NCA:hb

Province of British Col( )ia

(Vancouver
British Columbia
V6H 1A6
Telephone: (604) 736-8721

000014

File: 83-50984

July 4, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaint of Mr. Ben Temnoff

In May, 1983, you received my preliminary report regarding Mr. Temnoff's complaint against the Workers' Compensation Board. Since then, more problems have developed for Mr. Temnoff. As these are extensions of issues already discussed in our letter, I feel that they should be brought to your attention now, so that you can examine them all in the same context.

Essentially, his new problems relate to treatment costs that Mr. Temnoff has incurred during his year of suspension - costs in three areas, and for which, to date, he has been refused coverage by the Board.

The first area is the medical consultations that Mr. Temnoff's own specialists supplied for the Board: a bill for $200 has been received by Mr. Temnoff from Dr. M. S[redacted] and one for $97.50 from Dr. G. P[redacted]. Both bills are dated November 23, 1982.

As I mentioned in the preliminary report, Mr. Temnoff's adjudicator improperly placed the onus upon the suspended worker for supplying the Board with medical information. In case there should be any doubt about this, I quote from the adjudicator's memo #12, dated January 14, 1983:

> First of all, this claim was not approved by me to go down to Quality Control in late August, 1982, as there was still action being carried out on the worker's claim. Basically, we were awaiting recent medical reports from the worker's orthopedic specialist, Dr. S[redacted], for his opinions regarding the worker's ongoing problems dealing both with his compensable right arm injury as well as the suddenly appearing back problem which did not appear to be related to this claim whatsoever.

Further on in this memo, the adjudicator describes his December 22, 1982 meeting with Mr. Temnoff and his lawyer, during which the status of the claim was discussed:

> Nonetheless, in view of the physical symptoms that I myself saw plus the information contained in Dr. S[redacted]'s report, it was agreed mutually that a Board examination would be the best way to find out exactly what the worker's disability is and how the disability, whatever it may be, relates to the compensable injury under this claim.

I also refer you to memo #13, dated January 14, 1983, in which the adjudicator makes his first request for a medical examination by a Board doctor (although Mr. Temnoff had been suspended for seven months by this time):

> Unfortunately, due to various misunderstandings with the worker's physicians as well as his lawyer, only recently have reports been received which indicate ongoing complaints referrable to the compensable right tennis elbow.

From the foregoing it is clear that the adjudicator was relying entirely upon medical reports supplied by Mr. Temnoff for the first seven months following the suspension. During that period he received two reports from Dr. S[redacted] dated September 30, 1982 and November 23, 1982, as well as one from Dr. P[redacted] also dated November 23, 1982. It would therefore be unreasonable for the Worker's Compensation Board to refuse to cover the cost of these reports as there is simply no justification, on any policy grounds, for making the claimant financially responsible for adjudicative investigations.

The second area relates to the physiotherapy that Mr. Temnoff has been receiving, on the order of his physicians, for the past year. The Claims Adjudication Manual states clearly, in #58.30 of the section on Medical Assistance, that while a claim is suspended there is to be no authorization for treatment. However, when the physiotherapist called the Board, at the urging of Mr. Temnoff, to see whether or not the bills should continue to be sent to the Board after his suspension, the response, according to the physiotherapist's receptionist, was that "it looks good" for continuing coverage. Thus, the physiotherapist continued to send the bills to the Board instead of putting the treatments onto Mr. Temnoff's general medical insurance or some extended coverage under Human Resources. Mr. Temnoff now finds that even if the provincial medical coverage will retroactively accept the physiotherapy charges for the past year he will still be owing somewhat over $400 for his past treatments.

The third area relates to the pharmaceutical bills for prescribed drugs that Mr. Temnoff has been receiving during the past year. My assistant spoke to Mr. D. P[redacted], owner of the Vernon pharmacy where the majority of Mr. Temnoff's prescriptions were filled. He, too, had phoned the Board to find out if the bills would continue to be paid, and was simply told that the claim was "under review" for the time. No indication was ever given to him that the bills would not be paid and that alternate coverage should be found, even when he submitted a note with the February, 1983 bill, pointing out that payment was long overdue. As Mr. P[redacted] pointed out to my assistant, coverage could have been arranged through Human Resources right from the beginning if the Board had indicated that Mr. Temnoff would not be eligible. Instead, it now appears that Mr. Temnoff owes perhaps as much as $900 for his past prescriptions. Human Resources is now covering the cost of his prescriptions, but they cannot issue retroactive coverage.

In view of these developments I find that the Workers' Compensation Board had a duty to inform the health professionals, when they enquired, that Mr. Temnoff's coverage had been suspended and no treatment could be authorized. By not so doing the Board misled the health professionals treating him and caused him an unnecessary and unreasonable accumulation of personal debts.

I also find that the Board subjected Mr. Temnoff to an unreasonable and unfair procedure by refusing to reimburse him for the medical reports that he was expected to produce for his adjudicator.

Possible Recommendations:

I am considering the following supplementary recommendations:

1. That the Board assume responsibility for the physiotherapy, pharmacy and medical bills that have accumulated since Mr. Temnoff's claim was suspended in June, 1982.

2. That the Board institute a policy of automatically informing those health professionals who are billing the Board when a worker's claim is suspended.

Yours sincerely,

Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
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OFFICE OF THE COMMISSIONERS

30 August 1983

RECEIVED
SEP 01 1983
OMB. 90
VANCOUVER

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-50984

Dear Dr. Friedmann:

RE: Ben TEMNOFF
Claim No. LC82350055

A letter dated July 4, 1983, has been received from you which crossed in the post with my letter of the same date responding to your letter of May 30, 1983.

All the issues which you have raised on this claim were discussed at the recent meeting between Mr. Bucher and members of your staff.

The Commissioners have concluded that no change should be made in their decisions set out in my letter of July 4, 1983. Benefits will not be paid to Mr. Temnoff beyond June, 1982, unless and until he is successful on his present appeal to the board of review. Nor will the Board pay for Mr. Temnoff's legal fees. On the other hand, the Board will pay the accounts of Dr. S[redacted] and P[redacted] which was agreed to in my letter of July 4, 1983, and has now been specifically requested in your letter of that date.

Your letter of July 4, 1983, also asks that the Board pay the accounts of the pharmacist and physiotherapist for the goods and services which they provided between June 1982 and being notified of the termination of the claim in June 1983. For the same reasons which led the Commissioners to conclude that wage loss benefits cannot be paid following June 1982, pending the resolution of Mr. Temnoff's appeal,

continued...../2

the Commissioners could not agree to pay these accounts as far as Mr. Temnoff is concerned. It would impliedly recognize that his complaints were compensable and be a pre-judgment of his current appeal.

You appear, however, to be suggesting that, even if the reimbursement should not be made to Mr. Temnoff on the basis of fairness to him, it should be done on the basis of fairness to the physiotherapist and pharmacist who provided the service. The Board misled those persons into providing the service to Mr. Temnoff on the understanding that the Board would pay for it. They were prejudiced by the Board's failure to notify them of the problem with the claim in that they did not make alternative arrangements for payment.

The Commissioners must first of all point out that the problem pointed out by you has only arisen in this case because of the unusual delay by the Claims Adjudicator. It would not arise in most cases because the delays in decision making would not be excessive. The Board would not, in general, want to discourage suppliers from extending credit to claimants, but on the other hand, the Commissioners feel that any such extension must normally be at the supplier's own risk. It is a business decision for them to make. There are many suppliers, they are sure, who require the claimant to pay the bill himself and then seek reimbursement from the Board. The Board's right to make decisions unfavourable to workers and to refuse to pay accounts as a result of that decision cannot be restricted.

Nor do the Commissioners consider that it would be practicable in every case to notify suppliers of routine delays or potential unfavourable decisions. Delays of some kind or other and the potential for making an unfavourable decision always exist. It is part of the risk of the supplier extending credit which it is his choice to make. There could possibly be an exception when it is definitely known in a particular case that there will be a significant delay and the Commissioners

continued...../3

would certainly agree that all concerned parties should be notified in that event. However, even if there was a failure to notify a supplier in such a case, this in itself would not normally give rise to a right to have his accounts paid since the failure to notify him would be remedied as soon as a first account was received.

The Commissioners are prepared to make an exception in this case and direct payment of the accounts for the period in question. This is not just because of the excessive and unusual delay in adjudication and the initial failure to notify the physiotherapist and pharmacist, but also because of the fact that their accounts were subsequently allowed to pile up without their being notified. The Commissioners regard the agreement to pay in this case as being based on the special circumstances of the case and as not setting a precedent.

In the result, the Commissioners affirm the conclusions set out in my July 4, 1983, letter and also agree to your proposal that the pharmacist and physiotherapist accounts incurred in the year following June, 1982, be paid.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

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000020

File: 83-50984

April 6, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Mr. Ben Temnoff against the Workers' Compensation Board, Claim No. LC82350055

I am responding to Mr. Attewell's letter of August 30, 1983, regarding Mr. Temnoff. I believe that a satisfactory resolution has been reached on most issues, so my comments are restricted to the only one that remains outstanding - payment of Mr. Temnoff's legal fees by the Board. The bill for the services of Mr. F[redacted], Mr. Temnoff's solicitor, was received recently, and totals $297.50.

While the Workers Compensation Act does not specifically comment on the payment of legal fees, the Board's general policy is not to pay such fees, and lies in the discretion allowed by Section 100 of the Act:

> The Board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses he has been put to by reason of or incidental to the contest...(my emphasis).

As the policy of not compensating for legal costs is a discretionary matter rather than one authorized by statute, it follows that it could be varied if the circumstances of an individual's case warranted an exception being made. My understanding is that, to date, no such exception has been made - perhaps because no case has occurred with a fact situation that would place it outside the reasons set out in Decision 69 of the Report Series, which describes the justification for the Board's policy on legal fees. In the context of Mr. Temnoff's claim I have examined those reasons in the order that they are cited in Decision 69, as follows:

1. First, our system of claims adjudication is designed to make legal advice and advocacy unnecessary. Claims Adjudicators are instructed to seek out the evidence and explore the arguments themselves, not to rely on initiative or presentation of material by workers or employers. Boards of review take the same approach, and if there is any inadequacy in the extent of the enquiries made at first instance, that is subject to correction by a board of review on appeal whether or not a presentation is made.

In Mr. Temnoff's case, the Commissioners found that the adjudicator was not performing as he should have. He committed procedural errors, allowed unreasonable delay, appeared to throw the onus onto the claimant and was negligent in his handling of the claim. Furthermore, Mr. Temnoff had no access to the board of review for correction of these faults. He was informed by the adjudicator (as was my assistant) that Board policy allowed no appeal until there was a decision that could be appealed, and the suspension of benefits did not amount to a decision. Mr. Temnoff's lawyer attempted to compensate for the shortcomings of the adjudicator by organizing witnesses and medical reports in support of his client's claim, telephoning and writing to the adjudicator, setting up a meeting with him, and, ultimately, writing in frustration to the Commissioners. While the lawyer may have been less effective than the Commissioners in convincing the adjudicator of the necessity for making the long overdue decision, he was certainly doing everything that he could to achieve that end.

2. Secondly, it is difficult to see on what rational basis lawyers can be distinguished from other kinds of advisors. Lawyers are generally helpful in having a capability for presenting material in an organized way. But in terms of training to deal specifically with Workers' Compensation matters, the training of lawyers is not, generally speaking, greater than that of Union officials; and this is so both with regard to substantive law and procedure.

When Mr. Temnoff's claim was first suspended, he consulted a lawyer at the local Legal Services Office for just the kind of assistance described above - accumulation and presentation of relevant information. Lawyers in such positions usually develop more expertise with Workers' Compensation claims than many who are members of the private bar. (As Mr. Temnoff was not a unionized worker he did not have access to such a potentially useful resource.) It was not until he was told that fraud charges were being considered that Mr. Temnoff consulted Mr. F[redacted], and it would be unreasonable not to expect a person to retain a lawyer under such circumstances. As the Commissioners themselves noted in their July 4, 1983 letter to me, after Mr. Temnoff was informed of the possibility of prosecution the adjudicator should not have left the matter unresolved in the way he did. Instead, the threat was sustained for months and was still being described (to my assistant) as a real possibility as late as February of 1983.

Furthermore, defence of the fraud issue cannot be differentiated from advocacy in support of the compensation claim. Contradiction of the allegations of fraud, whether by proof of genuine disability or disclaimers by witnesses, or both, should have been able to forestall criminal charges. It was the only possible rebuttive action open to the lawyer as long as the adjudicator refused to provide concrete information about the alleged fraud.

3. Thirdly, if a claimant finds a need for advice from a lawyer, it is available without charge from the Compensation Consultant...

A Compensation Consultant would not be an appropriate choice for defending someone facing criminal charges. The Compensation Consultant is not authorized to advise workers on criminal matters.

4. Fourthly, we do not see any rational ground on which we could justify the payment of fees out of the Accident Fund for advice while not at the same time paying fees for advocacy. But if the Board were to pay for advocacy by lawyer, that would obviously create a tendency to expand the use of lawyers as advocates in compensation claims. This could easily snowball, because once the use of lawyers became a common practice, those who did not have one might then begin to feel under-represented...

This fourth reason is probably the key to the Board's use of discretionary power. If compensation for legal fees was not restricted to exceptional cases (it cannot legally be completely disallowed), the structure and funding of adjudicative and appeal procedures might undergo some fairly drastic changes. In the opinion of the Board these changes would not be desirable. It is a "flood-gates" argument.

Unfortunately, there appear to be no guidelines describing what an exceptional case might be, but it would appear that Mr. Temnoff's case is exceptional.

The circumstances of his claim overcome the first three concerns described in Reporter Decision No. 69. But even more significant are the decisions made by the Commissioners indicating that Mr. Temnoff's case is, indeed, an unusual one; for instance, their response to his request that he be allowed a change in adjudicator:

> The Commissioners are not normally prepared to agree to a request from a claimant that there be a change in the Claims Adjudicator handling his claim. Claims Adjudicators are often required as part of their jobs to make decisions or tell claimants things with which they disagree and a claimant will often request a change because of the nature of what the Claims Adjudicator has done rather than because there is any impropriety in the way in which he did it. However, because

> clearly Mr. [redacted] has committed procedural errors in the handling of Mr. Temnoff's case, the Commissioners agree that a change should be permitted in this case.

The Commissioners made an even more significant exception in their August 30, 1983 decision to cover the medical expenses (pharmaceutical and physiotherapy) that Mr. Temnoff incurred during the year that his claim was suspended:

> The Commissioners are prepared to make an exception in this case and direct payment of the accounts for the period in question. This is not just because of the excessive and unusual delay in adjudication and the initial failure to notify the physiotherapist and pharmacist, but also because of the fact that their accounts were subsequently allowed to pile-up without their being notified. The Commissioners regard the agreement to pay in this case is being based on the special circumstances of the case and as not setting a precedent.

I feel that this argument should also be applied to the issue of legal costs. In Mr. Temnoff's case no precedent is being created. Damages are a foreseeable consequence of a complainant suffering losses as a result of the negligence of a Board employee. Mr. Temnoff's situation should be a rare one. Adjudicators do not commonly threaten to lay fraud charges without justification. The payment of legal fees in this case will clearly not be seen as an invitation for workers to seek legal help for their claims.

If the Commissioners cannot allow an exception to their discretionary policy in this case, I would have to assume that they are fettering their discretion, have no intention of ever exercising it regardless of highly compelling circumstances, and are acting in a manner that is contrary to law by failing to consider this case on its merits. Alternatively, if the Commissioners are genuinely exercising their discretion, their decision is unjust because it is based on a wrong principle.

In summary, my recommendation pursuant to Section 22 of the Ombudsman Act is that it would be appropriate for the Commissioners to make an exception to their general policy, and authorize payment of Mr. Temnoff's legal costs.

Yours sincerely,

Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
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Richmond, B.C.
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Telephone 273-2266
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000024

OFFICE OF THE COMMISSIONERS

14 May 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

RECEIVED
MAY 17 1984
OMB. 90 IO
VANCOUVER

Your File: 83-50984

Dear Dr. Friedmann:

RE: Ben TEMNOFF
Claim No. LC82350055

Your letter dated April 6, 1984, has been considered by the Commissioners.

You are proposing that the Board pay Mr. Temnoff's legal fees.

You state that the Board has authority to do this under Section 100 of the Workers' Compensation Act but the Commissioners do not consider that that section applies to this case. Their interpretation of that section is that it only allows the Board to award costs in the case of claims contested between the claimant and the employer and even then only allows the Board to make orders for costs against the claimant or employer. It does not authorize the Board to pay costs out of its own funds. There is, in fact, no specific provision in the Workers' Compensation Act which authorizes the Board to pay legal fees and it is arguable whether the Board has this authority.

The Board's policy is that it does not pay legal fees. The Board recognizes its obligation under general administrative law not to rigidly apply its policy without regard to the individual circumstances that may arise in each case. They have considered the arguments made in your letter that the circumstances of Mr. Temnoff's case justify an exception from the Board's policy, but

continued...../2

RE: Ben Temnoff
Claim No. LC82350055

14 May 1984

cannot agree. By their previous decisions they have, as you point out, recognized that this case is exceptional but they do not consider that it is exceptional in a way that would justify the payment of legal fees. It is accepted that the Claims Adjudicator was guilty of undue delay and negligence, but feel that there are remedies within the system against such conduct other than getting a lawyer. As pointed out in my letter of July 4, 1983, Mr. Temnoff could have complained to any of the Claims Adjudicator's superiors within the Board right up to the Commissioners themselves.

You rely on the fact that fraud charges were under consideration, but the Commissioners do not feel that this is sufficient. Again, as pointed out in my letter of July 4, 1983, the Commissioners consider that the Claims Adjudicator did not act improperly in notifying Mr. Temnoff of a possible fraud investigation. His error lay in his neglect to follow up the matter. The Commissioners do not feel it would be reasonable to expect the Board to pay for a claimant's seeking legal advice just because he is advised of a possible fraud investigation. The fact that there is a neglect to follow up the investigation or the investigation is ultimately inconclusive or does not justify any suggestions of fraud does not, in the Commissioners' view, create a liability on the Board to pay the claimant's legal fees. They would also point out that the lawyer's correspondence does not appear to have dealt with the potential for a criminal prosecution. It seems rather to have been directed only at obtaining a change in the decision on the claim.

In the result, the Commissioners have concluded that they are unable to accept your recommendation. The Board will not pay Mr. Temnoff's legal fees.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

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File: 81-1934

November 7, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaint of Mr. M. Sorrenti

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

Complainant: Michele Sorrenti

Authority: Workers' Compensation Board

Claim Nos.: EC72114831
EC73115873
EC79145214

Background:

1. Mr. Sorrenti has back problems which date back several years. A claim based on an incident in June 1972 (EC72114831) was not accepted by the Board as Mr. Sorrenti did not notify the employer until May of the following year and made no mention to his doctor of the injury being work related. Following this injury Mr. Sorrenti had surgery to his left lower back in April 1973.

2. Mr. Sorrenti suffered a back strain at work in November 1973 (EC73115873) and this claim was accepted for a strain of the lumbar muscles. He received two weeks' treatment at the Rehabilitation Clinic and wage loss from November 27 to December 17, 1973.

3. Mr. Sorrenti next claimed that his back was injured while lifting a heavy object on August 10, 1979 (EC79145214). Information from Mr. Sorrenti's physician led the Claims Adjudicator to conclude that any problem Mr. Sorrenti was then suffering was related to his 1973 non-compensable claim. Consequently the claim was disallowed by the Adjudicator on October 23, 1979.

4. On March 14, 1980 Mr. Sorrenti appealed to the boards of review. The resulting decision on January 27, 1981 held that Mr. Sorrenti "sustained an acute lumbrosacral strain... which was superimposed upon a pre-existing non-occupational back condition". The board of review recommended that the Board provide wage loss for the period August 11 to November 1, 1979 and medical aid benefits for the period August 14 to November 16, 1979.

5. On March 6, 1981 Mr. Sorrenti contacted the Claims Adjudicator regarding his on-going back complaints. He had been off work from August 1979 until January 15, 1981. On March 20, 1981 the Claims Adjudicator denied re-opening of the claim on the basis that the claimant was not seen by the attending physician between November 16, 1979 and December 10, 1980. "The fact that the claimant did not seek medical attention between November 16, 1979 and December 10, 1980 appeared to indicate to the Claims Adjudicator that the claimant was not disabled during this period of time".

6. On March 20, 1981 Mr. Sorrenti indicated that he wanted to appeal the January 27, 1981 decision of the boards of review. This appeal was received by the Commissioners on September 16, 1981. On March 17, 1982 the Board advised Mr. Sorrenti that "there is a lack of medical evidence to support your claim that you continued to be disabled following November 1, 1979 or that any continuing complaints from which you suffered resulted from your August 10, 1979 injury". The appeal was denied.

7. On June 10, 1982 Mr. Sorrenti attempted to have his case go before a Medical Review Panel but was unsuccessful when the statement from his doctor was felt to be too equivocal to constitute a proper certificate.

Last Decision Level:

On June 21, 1982 the Solicitor, Legal Services, decided that Mr. Sorrenti would not be allowed a Medical Review Panel. However, the decision which merits prime consideration in this report is the Commissioners' decision of March 17, 1982 which, on the basis of the lack of supporting medical evidence, denied Mr. Sorrenti's claim that he continued to be disabled following November 1, 1979.

Employer Involvement:

No contact was made with an employer as Mr. Sorrenti was self-employed when the accident of August, 1979 occurred.

Issues Considered:

1. Did the Board err in its handling of the 1973 claim (re: 1972 injury) and in its failure to relate the August 10, 1979 injury to the November, 1973 injury?

2. Did the Board err in not allowing the appeal to a Medical Review Panel in June, 1982.

3. Did the Commissioners err in denying Mr. Sorrenti's appeal from the board of review on March 17, 1982.

I did not deal with the Board's refusal to reopen Mr. Sorrenti's claim on March 20, 1981 as the issue here is identical to the issue investigated in the Commissioners' March 17, 1982 denial of his appeal from the boards of review.

Findings:

Issue #1 1973 Claims

1. The key to Mr. Sorrenti's problems appears to lie with his 1972 injury. Medical reports from his own physician and from the Board medical advisor link his continuing problems with the surgery resulting from his 1972 injury. Current x-rays show degenerative disc disease at the L4-5 level on the same side as Mr. Sorrenti's operation. As previously indicated Mr. Sorrenti did not notify his employer for almost a year and he made no mention to his doctor of his injury being work related.

2. No physician attempts to link Mr. Sorrenti's 1979 injury with his 1973 injury which was just a simple muscle strain. The weight of medical opinion is that the link is between the 1979 injury and the 1972 non-compensable injury and subsequent 1973 surgery.

3. It is most unfortunate that Mr. Sorrenti did not report his 1972 injury as a compensable accident at the time of occurrence. It did not seem to be that serious an injury at the time and Mr. Sorrenti claims that he was unfamiliar with Canadian ways. Had he reported it, possibly his present problems might not exist to the extent they do.

While I can sympathize with Mr. Sorrenti's predicament, I am not able to find this part of his complaint substantiated.

Issue #2 Medical Review Panel

1. Dr. [redacted]'s certificate dated May 25, 1982 and required by the Board to certify as to the existence of a bona fide medical dispute appears to be too equivocal for the Board to

accept for that purpose. Dr. DeRosario's writing is difficult to read but the certificate includes such statements as the decision reached by the Commissioners on March 17, 1982 is "perfectly justified in light of evidence submitted".

2. Responding for the Board, Mr. Goseltine stated in his letter of June 21, 1982:

> Dr. [redacted] goes on to say that you had no money to pay doctors for visits and that "this puts a different aspect on the issue", but he then says "I cannot answer a simple yes or no to the question posed".

3. Mr. Goseltine forwarded an additional blank form to Mr. Sorrenti should he "wish Dr. [redacted] or any other medical doctor to make a further attempt to define a bona fide medical dispute". Mr. Goseltine also informed Mr. Sorrenti that he could appeal the decision not to accept Dr. [redacted]'s certificate to a board of review.

I am not able to substantiate the complaint that the Board erred in not allowing an appeal to a Medical Review Panel in June, 1982.

Issue #3 Commissioners' Decision

1. The reason given by the Commissioners for not accepting Mr. Sorrenti's claim on appeal from the boards of review was that he had not had contact with a medical doctor for a thirteen month period. There is therefore no medical evidence in existence to support his claim.

2. While it may be true that there is a lack of medical evidence to support Mr. Sorrenti's claim, that does not mean that there is a total lack of evidence to support it; and the lack of medical evidence may be explained by Mr. Sorrenti's contention that he simply suffered in silence during this period of time. As the Board initially accepted no responsibility for Mr. Sorrenti's August 10, 1979 injury until the board of review decision in January, 1981, and as Mr. Sorrenti had no M.S.P. coverage and had run up a bill of close to $1000 which he was unable to pay, and furthermore felt that his previous visits to the doctor had not been all that productive, Mr. Sorrenti decided that he could not continue to make visits to the doctor at that time. Dr. [redacted] confirms that Mr. Sorrenti did have a large outstanding bill at the time and that this may have prompted him to refrain from making the necessary visits.

3. The doctor's last report prior to this hiatus (November 16, 1979) indicated that Mr. Sorrenti was able to return to work, but added the rider, "light duties". The question on the medical report as to how long he would continue to be disabled was answered with a question mark. The doctor indicated that Mr. Sorrenti would likely experience continuing back pains. The first report when he again saw a doctor about his back

(December 10, 1980) answers the question, Is he able to resume his usual work?, with a clear "No". The question of how much longer he would be totally disabled is again answered with a question mark. Dr. [redacted] noted in this report that "Mr. Sorrenti continues to have back problems".

4. There is considerable evidence of Mr. Sorrenti's continuing disability provided by persons who had contact with him in Prince George at the time. Many of these witnesses have not seen Mr. Sorrenti since he moved from Prince George to Mackenzie around October of 1980.

5. Mr. Frank Wagner who operates Wagner's Grocery Store in Prince George saw Mr. Sorrenti "every second day" as he lived just across the street and frequented that establishment to purchase groceries. "He was really sick", stated Mr. Wagner. He was "always complaining about his back and wrists". According to Mr. Wagner, Mr. Sorrenti walked "with trouble - a little bent over". This condition stretched over "a couple or three years or so".

6. Mr. & Mrs. George Gibbard are residents of Prince George who knew Mr. Sorrenti as he used to fix trucks for Mr. Gibbard. In describing Mr. Sorrenti during this period of time the Gibbard's state "any walking - he could hardly do... one little wrong move - he was in pain". They recall Mr. Sorrenti as tending to walk "bent over". They estimate this condition lasted about a year, but was really bad for three to four months.

7. Mrs. Vic Creuzot, another resident of Prince George, and her husband had been friends with the Sorrenti's when they lived in that city. Mrs. Creuzot says of Mr. Sorrenti that he "was really crippled up" and "walked crooked". She further states that "he could not lift anything". She recalls that he always sat on the floor as he could not sit on a sofa whenever he visited their house. She thinks this condition possibly lasted for up to three years.

8. Mr. [redacted] a Crown Prosecutor who came from Prince George to Vancouver a few months ago and who is a distant relative by marriage (he is married to Mr. Sorrenti's cousin), had seen Mr. Sorrenti at least once a month. He recalled Mr. Sorrenti walking "really stiff" and adds that he was particularly stiff when sitting - "sitting bolt upright". It was Mr. [redacted] impression that Mr. Sorrenti's pain was genuine. He recalls Mr. Sorrenti's predicament lasting a couple of years - until he went to Mackenzie - but cannot really pinpoint the time.

9. Unable to work, Mr. Sorrenti was forced to go on social assistance during this period of time. The Ministry of Human Resources records also make reference to his having a back injury at that time. There is a suggestion in these records that about mid-August of 1980 he might have obtained full time employment doing light body work.

10. Worker's Compensation Board training notes for Session 103 state:

> Item 9. Recently the Vice-Chairman replied to an adjudicator's challenge of a board of review decision regarding the disbursements of benefits for a period of time where no medical proof of disability could be established, i.e. no treatment was sought by the claimant. The essence of the reply was that medical evidence of disability is usually the best evidence, but on some occasions, evidence from the claimant himself may fill in the necessary gaps.

11. A memorandum from Mr. J.B. Paradis, former Vic-Chairman of the Board, indicates that where medical evidence is lacking, other acceptable evidence may suffice. The memorandum dated January 4, 1979 is entitled "Payment of Claims Without Medical Reports", and reads in part:

> > There must be some discretion to depart from the principle that wage loss benefits are to be paid only on medical confirmation of disability. That confirmation may appear at the time the disability begins, some time during the disability, or in some cases, after it has ceased. The question is always whether the claimant was disabled. The best evidence of that disability is almost always medical evidence, but on some occasions, evidence from the claimant himself or from other sources may be sufficient to establish the existence and continuation of the disability.

From the testimony of witnesses I believe there is confirmation that during the time period in question Mr. Sorrenti continued to be in pain due to his back even though he was not attending a physician and that he was not able to work regularly during this time.

Conclusion:

Insofar as certain of the above information was not available to the Commissioners when they made the decision of March 17, 1982 that Mr. Sorrenti's claim to be disabled after November 1, 1979 was not supported, that decision may have been based on a mistake of fact. I may therefore recommend that Mr. Sorrenti be paid a suitable period of benefits following November 1, 1979.

Karl A. Friedmann
Ombudsman
November 7, 1983

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

9 February 1984

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VANCOUVER

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 81-1934

Dear Dr. Friedmann:

RE: Michele SORRENTI
Claim No. EC79145214

Your letter dated November 7, 1983, has been considered by the Commissioners.

You are proposing that wage loss benefits be paid after November 1, 1979, and in support of that proposal refer to certain statements from persons who knew Mr. Sorrenti during the time in question. The Commissioners doubt whether those statements could make up for the lack of medical evidence of disability. However, before reaching a decision on your proposal, they would like to receive copies of those statements or of any written record of them which you may have.

Yours truly,

for N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
Vancouver
British Columbia
V6H 1A6
Telephone: (604) 736-8721

000035

File: 83-52793

March 20, 1984

Mr. N.C. Attewell
Secretary to the Board
Workers Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Attewell:

Re: Mr. Michele Sorrenti, Claim No. EC79145214

Further to your letter of February 9, 1984, I have now received written statements from the persons who knew Mr. Sorrenti and had earlier provided me with information by telephone concerning his back condition. I enclose them for the Board's consideration.

I would appreciate these letters being considered in the context of my November 7, 1983 Section 16 recommendation to the Commissioners.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

Encls.(4)

Legislative Assembly
Province of British Columbia

OMBUDSMAN

2, 1275 West Sixth Avenue
Vancouver
British Columbia
V6H 1A6
Telephone: (604) 736-8721

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FEB 06 1984
CROWN COUNSEL
VANCOUVER

February 6, 1984

Mr. [redacted]
Crown Counsel Office
222 Main Street
Vancouver, B.C.
V6A 2S8

Dear [redacted]

Some time ago I discussed with you by telephone the condition of Mr. Michele Sorrenti during a period of time he was suffering from back problems while living in Prince George.

In recommending to the Workers' Compensation Board that Mr. Sorrenti be considered for benefits for this period of time, short quotations from the information you provided were used. The Board has indicated that it would find it more helpful if it could receive complete statements from the witnesses quoted.

Could I therefore ask you to provide me with a written statement of how you perceived Mr. Sorrenti's physical condition during the time you were acquainted with him in Prince George, with particular reference to the time period August 10, 1979 to December 10, 1980? Would you then please sign and date this statement and return it to me in the enclosed envelope?

If you have any questions, please contact me at 736-8721, collect.

Your assistance is very greatly appreciated.

Yours sincerely,

Keith Henders
Assistant to the Ombudsman

I'm sorry. I don't have time for this and as I indicated I cannot recall when Sorrenti was displaying symptoms consistent with having a sore back. I do recall that over "some" period of time he did display such symptoms. [redacted]

Encl.

KH

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VANCOUVER

Ombudsman
202 - 1275 West Sixth Avenue
Vancouver, B. C.
V6H 1A6

Attention: Keith Henders

Dear Sir:

Re: Mr. Michele Sorrenti

In answer to your letter dated 1984 02 06, I recall that for a long period of time, specifically the Winter of 1979 through 1980, Mr. Sorrenti constantly complained of back problems.

In my opinion, his physical condition kept him from functioning normally. It was obvious even from the way he walked that he was in pain or at the least, uncomfortable.

Yours truly

Frank Wagner
Mr. F. Wagner

1984 02 07

FW/kw

LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA
Ombudsman

202 - 1275 West 6th Avenue, Vancouver, British Columbia V6H 1A6

PRINCE GEORGE 1984 8 11

F WAGNER
725 ALWARD ST
PRINCE GEORGE BC
V2M 2E5

OFFICE OF THE OMBUDSMAN
#202 - 1275 WEST 6th AVE.
VANCOUVER, B.C. V6H 1A6

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Dear Mr. Hendrix

We knew Michelle Sorenti for at least a year during 1979-80. During the time we knew him, I can honestly say he walked with a definite lean to his back. He couldn't sit on a soft chair without having trouble standing up. He complained of the perpetual pain in his back. He couldn't lift anything or twist his back without severe pain. It was quite noticable that he had a back problem.

Yours Truly,

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Mr. & Mrs. Vic Crevzot
R.R. 8, Site 7, Comp 10
Prince George, B.C. V2N 4J

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Office of the Ombudsman
#202 - 1275 West 6th Ave

000039

Mr. + Mrs G. Gibbard,
4315 Chestnut St
Prince George, BC
V2K 2T4

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CMB 90
VANCOUVER

February 17, 1984

Dear Mr. Henders,

In regards to your letter inquiring of Mr. Michele Sorrenti's back problems while living in Prince George, we observed him to be having difficulties at times.

During the time period Aug. 10, 1979 to Nov. 10 1980 we visited with Mr. Sorrenti several times in his home. We both recall that he could not straighten his back, he walked bent over and it looked like he was in some pain. He seemed to have difficulty getting around as he could not straighten his back.

I hope this will be of help to you in your investigation.

Yours sincerely,

Ruth Gibbard — Ruth Gibbard

George Gibbard — George Gibb

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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9 May 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-52793

Dear Dr. Friedmann:

RE: Michele SORRENTI
Claim No. EC79145214

The statements submitted with your letter of March 20, 1984, have been considered by the Commissioners.

A departure from the principle that there must be medical evidence of disability before wage loss benefits are paid is only allowed in exceptional cases. Even then, it would normally only be made for short periods of time. The longer the period in dispute, the more difficult it would become to explain a failure to seek medical treatment. Having regard to the lengthy period involved and the other circumstances of this case, the Commissioners have concluded that no exception can be justified. The statements you submit are too uncertain to provide a proper basis for concluding for what periods additional benefits might be paid and the extent of any disability that might have existed.

In the result, the Commissioners have decided not to accept your proposed recommendation. No further wage loss benefits will be paid to Mr. Sorrenti.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
Vancouver
British Columbia
V6H 1A6
Telephone. (604) 736-8721

000041

File: 83-52793

July 17, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Michele Sorrenti, Claim No. EC79145214

I am responding to Mr. Attewell's letter of May 9, 1984.

While I can appreciate the difficulty the Commissioners face in having to account for an extensive time period in which Mr. Sorrenti did not attend a physician, I continue to see this as a most sympathetic case. The board of review found Mr. Sorrenti to be a credible witness and I too am impressed by his sincerity.

The Board's position in denying Mr. Sorrenti further wage loss benefits rests on the theme repeated frequently in the file material: the fact this worker did not seek medical attention between November 16, 1979 and December 10, 1980 appears to indicate that the worker was not disabled during this time period.

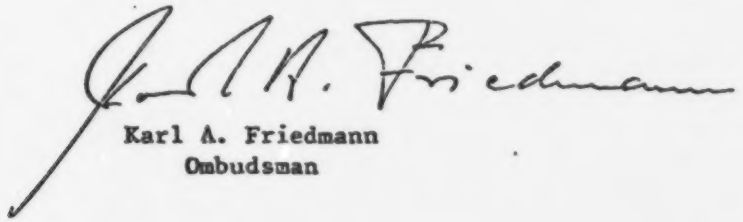
I find Mr. Sorrenti's account plausible. He says that because he had accrued a bill of almost a thousand dollars with his doctor which he was unable to pay, and because he could see no benefit being derived from his weekly visits, he discontinued these visits. It is most unfortunate that he did so, but in view of his economic circumstances I can well understand his concern that he not plunge deeper into debt. This is especially understandable in view of the fact that at that time there was no indication that the Board would accept responsibility for any part of his August 10, 1980 injury.

Though admittedly not the best evidence, the testimonial letters provided by people who encountered Mr. Sorrenti during the time in question lend credence to the proposition that there was indeed a

period of continuing disability. The letter from Mr. Frank Wagner who saw Mr. Sorrenti frequently, as he visited Mr. Wagner's grocery store every other day, indicates that Mr. Sorrenti's back problems were constant from the winter of 1979 through 1980. Mrs. Creuzot describes him as being quite disabled for a period of a year during 1979/80. Mr. & Mrs. Gibbard make similar observations for the time period August 10, 1979 to December 10, 1980. Perhaps Section 99 of the Workers Compensation Act should be applied to the situation to ensure that a worker is not denied compensation he honestly merits for injuries suffered on the job.

I am writing this letter pursuant to Section 22 of the Ombudsman Act. The grounds on which I make the following recommendation are that the Board's requiring Mr. Sorrenti to produce further medical evidence of disability is oppressive. The Board is basing its refusal to accept Mr. Sorrenti's claim upon an unreasonable pre-condition. I consider it reasonable for Mr. Sorrenti to have stopped seeing his physician. It is unreasonable for the Board to require medical evidence of disability which in the circumstances cannot be produced. I therefore recommend that Mr. Sorrenti be paid benefits for a suitable period following November 1, 1979.

Yours sincerely,



Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

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SEP 26 1984
OMB. 90 KH
VANCOUVER

25 September 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Michele SORRENTI
Claim No. EC79145214

Your letter dated July 17, 1984, has been considered by the Commissioners.

The Commissioners remain of the opinion that the position stated in my May 9, 1984, letter is correct. They note Mr. Sorrenti's reasons for not seeking medical treatment in the period in question and do not dispute them. However, this does not alter the fact that there is no medical evidence to support his claim that he was disabled. That Mr. Sorrenti had valid reasons for not seeking medical treatment does not mean that he must have had a disability for which wage loss benefits could be paid. It appears to the Commissioners that it would be irresponsible for the Board to pay wage loss benefits in a case of this type for such a long period without there being medical evidence of disability.

The Commissioners feel that the Board should, in any case, where there is a lack of medical evidence of disability take into consideration any other evidence of disability, including statements by lay persons. However, it is very difficult to base the payment of such benefits on such evidence since, even apart from the lack of expertise of the witnesses, their evidence will rarely be definite as to the duration and extent of disability. The longer the period in question, the more difficult this becomes. The Commissioners feel that much too long a period is involved here to allow them to rely on this type of evidence in the present case.

continued...../2

RE: Michele SORRENTI
Claim No. EC79145214 25 September 1984

In the result, the Commissioners have decided to reject your recommendation. No further wage loss benefits will be paid to Mr. Sorrenti.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
of British Columbia

Office of the
Ombudsman

1675 West 8th Avenue
Vancouver
British Columbia
V6H 1A6
Telephone: (604) 736-8721

000045

File: 83-50634

May 20, 1983.

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaint of Stanley McKay

I am nearing completion of my investigation of a complaint concerning the above-noted claim. Pursuant to section 16 of the Ombudsman Act I enclose the grounds which may lead to a recommendation in this matter.

After review of the enclosed material, I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

Encl. (1)

FINDINGS

of the Ombudsman concerning a complaint against the Workers' Compensation Board by Stanley McKay.

Background:

In 1972, Mr. McKay had a non-work related, total left hip replacement. In December 1978, Mr. McKay was injured at work when he slipped on a piece of electrical conduit, and fell heavily on his left side. This injury caused an aggravation of his pre-existing condition. It resulted in numerous operations including a left hip operation, revisal of his left femoral prosthesis and drainage of an abscess on the posterior aspect of his left thigh. Mr. McKay did not submit his application for compensation until February 1980. It was refused for lateness.

Issue:

Whether the Board should have used its discretion pursuant to section 55(3) and allowed Mr. McKay to file an application outside the one year limitation period.

Grounds for Adverse Finding:

1. In January 1979, Mr. McKay filled out a compensation form and left it with his supervisor, Mr. [redacted] to submit to the Board. It was not until October 1979 that he discovered his application had not been submitted to the Board. He was under the mistaken impression that an application for compensation must be submitted by a supervisor. However, he was not able to track down Mr. [redacted], who had been transferred, until February 1980. At this time Mr. McKay submitted a new application. Mr. McKay's story was confirmed by Mr. [redacted] in a letter of August 19, 1981, which stated:

> "He came back after the Christmas and New Year's holidays to pick up his tools and discussed the matter with me and requested that I submit a report to W.C.B., I agreed to do this, however, I said I didn't have time at the present but I would fill it out later. Somehow or other we became busy and I was transferred to another project in Victoria in February and in the process the letter became forgotten...There was a form made out at the time. It must have been lost or misplaced."

2. Mr. McKay was of the mistaken opinion that his company's insurance with Crown Life would cover the entire period of disability. He was not initially aware of the seriousness of

his injury.

As well, shortly before his accident Mr. McKay had been informed by his supervisor that the company preferred that employees claim for minor injuries under their Crown Life insurance, rather than Workers' Compensation, to improve the company's accident record. He was therefore under the impression that his job would be more secure if he applied for Crown Life benefits rather than Workers' Compensation benefits.

3. There is substantial evidence to establish that Mr. McKay's injury occurred at work. Furthermore, there is extensive medical evidence to indicate the severity of the consequences of this accident. In my opinion it is unjust for a valid claim to be defeated because of the claimant's failure to adhere to technical procedural requirements, if the position of any other person or the authority has not been prejudiced.

My opinion in this regard is similar to that expressed by the Commissioners in Decision #300 dated May 18, 1979. In this decision it was stated:

> "However, in enacting Section 52 the Legislature obviously adopted a different point of view. It clearly gave the Board very wide discretion to accept claims regardless of how tardy the application. Obviously, should a claim be filed several years after an incident causing injury, but the Board is satisfied that the evidence abundantly supports the claim, it would be absurd to say that no compensation is payable simply because an application has been filed out of time. However, in giving this latitude, the Legislature appears to have recognized that with a lapse of a long period of time the obtaining of evidence regarding the occurrence of an injury and its relationship to later complaints by the worker will become difficult if not impossible. Therefore, we are led to the conclusion that whenever the Board or any of its Officers is required to make a decision on a claim, the exercise of discretion under Section 52 will depend a great deal upon the lapse of time since the injury is alleged to have occurred because that lapse will have prejudiced the Board's ability to investigate the occurrence of the injury and its relationship to the subsequent condition."

In this case there is abundant evidence available and Mr. McKay made his claim only 60 days after the expiration of the statutory time period.

Possible Recommendations:

On the basis of these findings, I may recommend that the Commissioners should use their statutory discretion to allow Mr. McKay to make an application for compensation outside the one year limitation period.

Karl A. Friedmann
Ombudsman
May 20, 1983.

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

30 June 1983

RECEIVED
JUL 12 1983
OMB. BC
VANCOUVER

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-50634

Dear Sirs:

RE: Stanley McKAY
Claim No. XC78077687

Your letter dated May 20, 1983, has been considered by the Commissioners.

Each of the points you raise is dealt with in turn below.

The Board's interpretation of Sections 54, 55 and 56 of the Act is that they establish independent obligations on the part of the employer, the worker and the doctor to submit reports to the Board. The failure of one of those parties to fulfil his obligation does not excuse the others. In particular, the failure of an employer to report an injury to the Board does not constitute "special circumstances" for a worker's failure to reply within the meaning of Section 55(3). Therefore, the fact that Mr. [redacted] neglected to have the employer's report forwarded to the Board does not excuse Mr. McKay's failure to reply. Nor does the completion of any report which he made to his employer have this effect.

The Commissioners find it difficult in any event to accept that the failure of Mr. McKay to apply can reasonably be attributed to the fact that Mr. [redacted] failed to make a report. The fact that Mr. McKay had had previous compensation

continued...../2

claims and asked Mr. [redacted] to make a report indicates his general awareness of the procedural requirements for a claim. He should surely have pursued the matter further with the Board when he received no benefits or notification from the Board regarding a claim. There were still ten months to run of the one year period provided for by Section 55(3) when Mr. McKay last spoke to Mr. [redacted].

2. You will note from the correspondence on file that, on Mr. McKay's original appeal to the Commissioners, the employer does not accept Mr. McKay's allegations regarding its conduct (see its letter of December 11, 1981). Since you do not appear to have contacted the employer and do not comment on the employer's correspondence, the Commissioners are unable to accept the argument you present here regarding the company's conduct.

   They do not feel that Mr. McKay's mistaken opinion as to the coverage of his insurance company or the seriousness of his injury is sufficient to explain the fact that he failed to submit an application within one year. Again, they would point to his knowledge of Board procedures and to the evidence of his conversations with Mr. [redacted] indicating that he did wish to claim.

3. The Commissioners sympathize with your feelings that it is unfair for a valid claim to be defeated because of a technical procedural requirement. However, the Commissioners cannot decide claims purely by what is fair or unfair. They must decide them in accordance with the terms of the Workers' Compensation Act. Section 55 of the Act clearly contemplates that some claims which are otherwise valid will be barred through the failure to submit an application within the one year period.

The passage which you quote from Decision No. 300 is not material to the issue on Mr. McKay's claim. Section 55(3) has two basic requirements before a claim submitted outside the one year period can be accepted. These are:

continued...../3

RE: Stanley McKay
Claim No. XC78077687

30 June 1983

1. Special circumstances which precluded the filing of the application within the one year must be shown.

2. The Board must exercise its discretion to pay compensation. (Subsection (3) uses the word "may".)

A complete reading of Decision No. 300 makes it clear that the quotation from that decision set out in your letter refers to the second requirement, not the first. Mr. McKay's claim was denied on the basis of the first requirement. The requirement that there be special circumstances is concerned solely with the reasons of the claimant for not submitting his application in time and has nothing to do with the merits of the claim. The merits only become relevant once special circumstances are found to exist. Any other interpretation would clearly defeat the intention of the legislature in putting into Section 55(3) a requirement for "special circumstances which precluded the filing of an application".

In the result, the Commissioners consider that their previous decisions that the claim is barred were reasonable and they do not believe you have provided grounds for reversing them.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

6 September 1983

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SEP 07 1983
VANCOUVER

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-50634

Dear Dr. Friedmann:

RE: Stanley McKAY
Claim No. XC78077687

Following the meeting on August 11, 1983, between members of your staff and Mr. Bucher, this claim has been again reviewed by the Commissioners.

The major question at issue here is the factors that can be considered when determining for the purpose of Section 55(3) whether "there existed special circumstances which precluded the filing of an application" for compensation within one year after the injury. Can the merits of the claim be considered or is the question restricted to the claimant's reasons for not applying?

The Commissioners appreciate your concerns that an otherwise valid claim should be defeated through a "technical" requirement. However, the Commissioners must recognize the fact that the Act imposes certain "technical" requirements and that they cannot ignore these in the interests of what they or you consider to be justice or fairness except to the extent that the Act allows. It appears to them that the words quoted above from Section 55(3) are plainly concerned only with the claimant's reasons for not aplying and do not allow the Board to look at the merits of the claim. They do not see how the mere fact that the claimant has an otherwise meritorious claim could be said to be a special circumstance which precluded him from applying.

continued...../2

RE: Stanley McKay
Claim No. XC78077687 6 September 1983

As explained in my letter of June 30, 1983, the Commissioners do not consider that Decision No. 300 contradicts what is stated above. The authority given in that decision to consider the merits of a claim applies only when it has been concluded in a particular case that special circumstances did exist which precluded the claimant from applying within the one year period. The Commissioners agree, however, that there has been some misunderstanding of that decision and, for that reason, propose to issue a new decision to rescind Decision No. 300 and clarify the Board's policy.

In the result, the Commissioners remain unable to agree with your proposals regarding this claim which will continue to be barred.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

British Columbia
V6H 1A6
Telephone: (604) 736-8721 000054

File: 83-50634

November 7, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaint of Stanley McKay, Claim No. XC78077687

I would like to thank the Commissioners for their response of June 30 and September 6, 1983. In their response, the Commissioners have raised several issues which I would like to address.

1. I am pleased that the Commissioners have decided to clarify Decision #300. As it stands, it certainly creates confusion as to the Board's present policy in this area.

   However, it is still my opinion that Decision #300 supports Mr. McKay's claim and that his case contains the special circumstances necessary to justify the Commissioners proceeding to the second step of the equation set out in Decision #300. As stated in my previous letter, I think the merits of Mr. McKay's claim are sufficient to justify the Board's use of its "very wide discretion to accept claims regardless of how tardy the application" (Decision #300).

2. It appears that some confusion has arisen regarding which application Mr. [redacted] failed to file.

   > "In particular the failure of an employer to report an injury to the Board does not constitute 'special circumstances' for a worker's failure to reply within the meaning of Section 55(3). Therefore, the fact that Mr. [redacted] neglected to have the employer's report forwarded to the Board does not excuse Mr. McKay's failure to reply." (Commissioners' letter of June 30, 1983)

It was not only the company's application that Mr. [redacted] failed to file, he also failed to submit Mr. McKay's application. Mr. McKay filled out his compensation application in Mr. [redacted] presence and handed it to him, to submit to the Board with the employer's report. Neither of these reports were in fact submitted, as was confirmed by Mr. [redacted] August 19, 1981 letter. Therefore, the initial failure to submit the necessary forms was not in any way Mr. McKay's fault, but was solely the responsibility of Mr. [redacted]

3. Mr. McKay's confusion regarding the procedure for submitting his compensation application arose in October, 1979, when he discovered that there was no record of his previous accident application. He was under the mistaken opinion that his accident application had to be submitted through his supervisor. Therefore, at that point he tried to locate Mr. [redacted] to prove that he had submitted an application, a fact which is confirmed by Mr. [redacted] subsequent letter. Because Mr. [redacted] had changed his work location, it took Mr. McKay until February, 1980 to locate and communicate with him.

   Mr. McKay's misunderstanding may seem unlikely to someone who understands how the compensation system works. However, Mr. McKay informed my investigator that in all his prior accidents he had submitted his compensation application through his supervisor. He regarded this step as a necessary part of the compensation procedure. He was sincerely but mistakenly of the opinion that he was not able to submit an application directly himself. If he did not believe this, common sense dictates that he would have submitted another application in October 1979, and he would not have bothered to track down Mr. [redacted]

In conclusion, it is my opinion that this case provides the special circumstances and necessary merit to justify the Commissioners' use of their discretion as provided in Section 55(3), to extend the one year filing limitation period.

Pursuant to Section 22 of the Ombudsman Act, I find that it is unjust for the Commissioners to refuse to use their statutory discretion in the circumstances of this case and I recommend that they allow Mr. McKay to file his compensation application outside the one year limitation period.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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VANCOUVER
OFFICE OF THE COMMISSIONERS

000056

4 January 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-50634

Dear Dr. Friedmann:

RE: Stanley McKAY
Claim No. XC78077687

Your letter dated November 7, 1983, has been considered by the Commissioners.

The main argument in your letter is that when Mr. McKay saw Mr. [redacted] in early 1979, he not only asked him to file an employer's report but also gave him his completed application for compensation to transmit to the Board.

The Commissioners are unable to conclude that your argument justifies any change in their prior decisions. They cannot agree that Mr. [redacted]s statement of August 19, 1981, referred to Mr. McKay's application. The most reasonable interpretation of that statement is that it only refers to the employer's report. The Commissioners find it significant that neither in his letter of November 12, 1980, nor in his evidence to the board of review did Mr. McKay mention his giving his application to Mr. [redacted] In fact, the tenor of his evidence on those occasions is to the contrary. Finally, even if he did hand over his application at that time, there was still a period of ten months before the one-year period for applying to the Board expired. Explanation would still be required of why Mr. McKay took no action in that period when he heard nothing from the Board.

continued...../2

RE: Stanley McKay
Claim No. XC78077687 4 January 1984

In the result, the Commissioners are unable to agree with your recommendation. Mr. McKay's claim will continue to be rejected.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

000058

Dated Dec 7th 1983.

[redacted]

555- 10754 - 15th ST

SURREY BC

V3R. 4L6.

To whom it may concern.

Dear Sir.

I [redacted] was a member of the Telis Salvage staff from 1960 - 1979. and assisted in office duties and first Aid it was policy for the Company to send W.C.B. forms. employers and Employees statements together. This was in effect when Stan McKay worked for Telis Salvage and Exchange Ltd and had a W.C.B. Claim

Yours truly

[redacted]

This letter is to inform the Compensation Board, of the the following facts;

At Flavalle Cedar P.t Moody There were two forms made out for Stan McKay's injuries. They were both sent to the Office of -

Stolberg Construction Ltd. ~~titled~~
7980 River Rd,
Richmond
B.C.

Signed in my hand on Jan 10/84. Maple Ridge B.C

X [redacted]

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

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FEB 13 1984
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VANCOUVER

9 February 1984

Dr. Karl A. Friedmann,
Ombudsman,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-50634

Dear Dr. Friedmann:

RE: Stanley McKAY
Claim No. XC78077687

This claim was discussed at the meeting which took place on January 12, 1984, between Mr. Bucher and members of your staff.

At the meeting, two further documents were submitted by members of your staff, namely a statement from Mr. Buckle of December 7, 1983, and a further statement from Mr. [redacted].

The Commissioners note the further evidence contained in these reports, but remain unsatisfied that there were special circumstances that precluded Mr. McKay from filing an application for compensation within one year of the injury as required by Section 55. They would point out that Section 55 requires that the application be submitted to the Board and that it is insufficient for it to be submitted to the employer. If Mr. McKay submitted an application to his employer, this could account for some delay in his submitting an application to the Board, but could not explain a delay of more than a year.

In the result, the Commissioners have decided that no change should be made in their previous decisions to reject Mr. McKay's claim.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

V6H 1A5
Telephone: (604) 736-8721

File: 83-51348

June 16, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaints of Harold Berrow of European Shake & Shingle Ltd., Firm No. 180015-142, Claim #VC83303051; and [redacted] of [redacted] Custom Processing and Wholesale Seafoods Co. Ltd., Firm No. [redacted] Claim #XC81-26701

On May 12, 1983 I received a complaint from Harold Berrow about the Board's delay in paying him wage loss benefits. According to Mr. Berrow the delay was caused by the Assessment Department.

I have since heard from Mr. Berrow that his problem with the Assessment Department has now been straightened out and that he hopes to receive wage loss benefits soon. Although Mr. Berrow's problem seems to be resolved, I am concerned that assessment disputes may be interfering with the receipt of benefits by workers. I would appreciate your comments on this matter.

I also received a complaint from [redacted] about the different bases used by the Board for charging him assessments and paying him wage loss benefits. In particular, Mr. [redacted] states that he was assessed on the basis of earnings of $24,000.00 per year while his wage loss benefits were based on earnings of $14,000.00 per year only. Mr. [redacted] feels that this discrepancy is unjust and I would appreciate your comments on the matter.

Yours sincerely,

for Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

14 September 1983

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SEP 16 1983
CMB. SC
VANCOUVER

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-51348

Dear Dr. Friedmann:

RE: Harold Berrow, Claim No. VC83303051
Evergreen Shake & Shingle Ltd., Firm No. 180015-142
[redacted] Claim No. XC81026701
[redacted] Custom Processing and Wholesale
Seafoods Co. Ltd., Firm No. [redacted]

Your letter dated June 16, 1983, has been considered by the Commissioners.

As far as the Commissioners are aware, there is no general problem of delays in wage loss payments being caused because of assessment disputes. Nor do they see any particular problem in Mr. Berrow's case. He is the principal of a small limited company. The payment of his wage loss was held up for about two weeks because his company had not paid its first quarter's assessment for 1983. It does not seem to the Commissioners that the delay was excessive nor the grounds for it unreasonable.

Mr. [redacted]s company was assessed on total assessable earnings of $22,944.60. However, of this, only $4,092.00 represented his earnings. The balance related to a casual worker employed by the company and to fish purchases made by the company. This is set out in Mr. [redacted]s memo of May 12, 1983. The Claims Adjudicator based Mr. [redacted]s compensation benefits on the figure of $4,092.00.

continued...../2

The Commissioners hope the above sufficiently answers your enquiries on these claims.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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Vancouver
British Columbia
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000064

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

File: 83-51348

October 6, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaint of H. Berrow, Claim No. VC 83303051, of Evergreen Shake and Shingle Ltd., Firm No. 180015-142

In June 1983 I notified you of Mr. Berrow's complaint about the Board's delay in paying him wage loss benefits. According to Mr. Berrow the delay was caused by the Assessment Department.

I have now received the Commissioners' response dated September 14, 1983. The Commissioners state that Mr. Berrow is the principal of a small limited company. According to the Commissioners the payment of his wage loss benefits was held up for two weeks because his company had not yet paid its first quarter's assessment for 1983. The Commissioners do not consider the delay to be excessive nor the grounds for it to be unreasonable.

In my opinion the Board's refusal to pay Mr. Berrow wage loss benefits until his company had paid its first quarter's assessment may have been oppressive. An authority acts oppressively when it uses its superior position to place the citizen at an unreasonable disadvantage. As a worker Mr. Berrow is entitled to payment of wage loss benefits. The Assessment Department's collection of the employer company's assessments is a separate matter altogether. The compensation benefits to which a worker is entitled should not be withheld as a technique for forcing a company to pay outstanding assessments. Such benefits take the place of lost livelihood, which the worker ought not to be deprived of for the purpose of enforcing a debt to the Board in an unrelated matter.

This letter is written pursuant to Section 16 of the Ombudsman Act. I am considering the recommendation that the Board cease the practice of withholding wage loss benefits as a technique for forcing employers to pay assessments. I look forward to receiving your response to my preliminary findings and proposed recommendation in this case.

Yours sincerely,

for Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

9 December 1983

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Office of the Ombudsman
#202 - 1275 West 6th Avenue
Vancouver, B.C.
V6H 1A6

Attention: Dr. K.A. Friedmann
Ombudsman

Dear Dr. Friedmann:

Re: Harold Berrow, Claim No. VC83303051
Evergreen Shake & Shingle Ltd., Firm # 180015-142

Your letter dated October 6, 1983, has been considered by the Commissioners.

The Board's practice is that, if a small limited company does not pay its assessments, the amount owed by the company can be deducted from wage loss benefits payable to the principal of the company. (Pages 105 - 106 of Decision No. 335). The Board was, in Mr. Berrow's case, simply giving an opportunity for the company to pay its assessments before it deducted the amount owing by the company from his wage loss benefits. It would seem to the Commissioners to be more fair to the principal to provide him with an opportunity of this nature than to simply deduct the amount owing without warning. The Board has to be concerned with ensuring that assessment money which is the source of compensation benefits is collected. It does not seem to them that it would be reasonable or fair to other employers to allow company principals in such cases to be paid full benefits when their company has outstanding assessment liabilities.

In the result, the Commissioners consider that the present Board's practice is reasonable and that no change should be made.

Yours truly,

N.C. ATTEWELL
Secretary to the Board
NCA:hb

Province of British Columbia

Vancouver
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V6H 1A6
Telephone: (604) 736-8721

000067

File: 83-51348

March 23, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Harold Berrow, Claim No. VC83303051
Evergreen Shake & Shingle Ltd., Firm #180015-142

I have now had an opportunity to consider the Commissioners' letter of December 9, 1983.

I do not disagree with the Commissioners' assertion that they have a duty to ensure that outstanding assessment debts are collected. However, it is my opinion that an adequate procedure for collecting such debts is provided for in Division 4 of the Act. This section provides the Board with statutory procedures for collecting outstanding assessment debts. As well, it is an established compensation principle that compensation benefits which are provided to replace a worker's lost income should, with minor exceptions, be free from attachment for other debts. In my opinion these two factors support my recommendation that the attachment of compensation benefits for outstanding assessment debts should only be a last resort.

This position is consistent with my recommendation in the case of Richard Mochinski. That particular case pivoted on the Board's policy concerning the piercing of the corporate veil. It was my opinion that a worker who is injured should not be treated differently just because he is also a principal of the employer company. In my opinion this principle can be applied t Mr. Berrow's case. The fact that a company in which Mr. Berrow is a principal owes a debt to the Board should not affect Mr. Berrow's rightful entitlement as a worker to compensation. This would result in Mr. Berrow being treated differently just because he is also the principal of the employer company. The Board's relationship to Mr. Berrow as a worker and the Board's relationship to Mr. Berrow as an employer should be kept distinct.

Pursuant to Section 22 of the Ombudsman Act, it is my opinion that it is oppressive for the Board to attach the wages owing to a worker for his company's outstanding assessment debt to the Board without first proceeding with the other methods of collection enumerated in Divison 4 of the Act. I do not object to the Board providing the worker with the option of having this outstanding debt deducted from his compensation payments, if he so agrees. The worker could be informed that if legal proceedings were initiated it would cost him more than having his debt deducted directly from his compensation benefits, since the cost of legal proceedings would be added to the cost of the debt to the Board.

I recommend that the Board refrain from attaching compensation payments of workers whose companies owe assessment debts to the Board, until all other methods of collection provided by the Workers Compensation Act have been tried and proven unsuccessful, or unless the worker consents to the attachment of his compensation.

I await your response to my recommendation.

Yours sincerely,

Karl A. Friedmann
Ombudsman

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OFFICE OF THE COMMISSIONERS

9 May 1984

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MAY 1984
VANCOUVER

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-51348

Dear Dr. Friedmann:

RE: Harold BERROW
Claim No. VC83303051
Evergreen Shake & Shingle Ltd.
Firm No. 180015-142

Your letter dated March 23, 1984, has been considered by the Commissioners.

The Commissioners are unable to agree that the Board should be required to pursue the means of collecting assessments found in Division 4 of the Act before deducting the amount owed from compensation payments. It seems to them that it would, in fact, be somewhat illogical for the Board to adopt your proposal since this would involve it in paying out money with one hand and attempting to collect assessments owed with the other. The most reasonable procedure for the Board is just to deduct the amount owed. The position of the recipient of the compensation is protected by giving him advance notice and giving an opportunity to pay the assessments owed before the deduction is made. The amount and rate of the deduction is also varied in accordance with the amount of the payment and the recipient's circumstances.

The Commissioners do not feel that it is reasonable for you to rely on Section 15 to support your argument. While that

continued...../2

section does generally prohibit the making of deductions from compensation benefits, it contains an express exception for "money owing to the accident fund".

You refer to your recommendation regarding the Richard Mochinski case. The Board has not to date accepted that recommendation. However, as you have been advised, a legal opinion on the matter is being obtained and the Board's policy will be reviewed when it is received. In the meantime, the Commissioners wish to make no further comment regarding it. They would only state that, even if that policy were changed, there would not necessarily be a change in the policy presently under discussion. Though there are similarities, the two situations are not exactly the same.

In conclusion, the Commissioners have decided not to accept your proposal. The Board's practice will remain unchanged.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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000071

File: 81-1788

July 29, 1983.

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaint of Mr. John Rahn, Claim Nos. XC51020694 and XH78251247

I am nearing completion of my investigation of a complaint concerning the above noted claim (XC51020694). Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation. As well, I am making a proposal pursuant to S.14(2) of the Ombudsman Act. I would appreciate your comments.

I also enclose my decision concerning Mr. Rahn's complaint in relation to claim No. XH78251247. For the reasons stated it is my opinion that the complaint is not substantiated.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (2)

of the Ombudsman concerning complaints against the Workers' Compensation Board by Mr. John Rahn.

Background

1. Back Claim (XC51020694)

Mr. Rahn suffered a back strain at work on March 19, 1951. An x-ray shortly after the injury indicated "a slight relative loss of interspace between L2 and 3", but no other changes were seen. The conclusion was there was a possible lesion at the L2-3 level. Mr. Rahn returned to light work on May 21, 1951 but on October 5, after working at falling and bucking for approximately two weeks, had to quit because of his back disability. Mr. Rahn asked for a reopening in 1951. It was noted that the x-rays were essentially negative and there was no neurological evidence indicating the presence of a disc lesion; therefore the claim was not reopened. In 1955 the claim was reopened when the Board authorized Dr. [redacted] to perform a laminectomy for a protruded disc at L4-5. An x-ray dated August 13, 1955, showed that there were "minimal osteoarthritic changes of the lumbar spine. After the operation, it was reported that Mr. Rahn was "almost asymptomatic". An x-ray dated December 1, 1958 showed "a minor narrowing of the intervertebral disc space between L5 and S1, probably due to disc degeneration and possible Scheuermann's disease involving the lower dorsal vertebrae."

On November 28, 1958 Mr. Rahn suffered a new injury which was diagnosed as an acute lumbar strain. In June 1960 Mr. Rahn underwent a further laminectomy at L4-5. It was reported that a large recurrent disc was found and large amounts of degenerative material were removed. He was awarded a pension of 7.5 % of total after this operation. In 1978 it was again reported that there was recurrent pain in the same area of his lower back. It was the opinion of Dr. [redacted], his family physician, that this was a result of his 1951 injury. The x-ray showed that there were osteoarthritic changes involving the lower thoracic and all of the lumbar area. The Board doctor reviewed the x-rays and was of the opinion that the incident caused an aggravation of a degenerative disc at the L4-5 level, but that the degeneration could not be related to the claim incident. He felt that there had only been aggravation of the L4-5 disc which was dealt with. As a result, the Board denied a reopening of Mr. Rahn's claim in 1979. Mr. Rahn appealed to the boards of review who upheld the decision of the claims adjudicator.

2. Hearing Claim (XH78251247)

Mr. Rahn submitted an application for a gradual loss of hearing in 1979. In accepting his claim, the Board stated that they took the loss of hearing in his right ear as best representing his loss of

hearing in both ears due to occupational noise. The loss of hearing in his right ear was less than in his left ear. There was not sufficient loss of hearing to warrant a pension award of occupational deafness. Mr. Rahn attempted to appeal this decision to the boards of review but did not pursue the matter with them and the appeal was abandoned. Mr. Rahn feels that he should have been awarded a pension for his loss of hearing.

Last Decision Level

Neither of these complaints have previously been considered by the Commissioners. In the case of the back claim, the last decision was made by the boards of review in 1980 and in the case of the hearing claim the last decision was made by an adjudicator in 1979.

Employer Involvement

The employer is [redacted], and therefore is subject to experience rating. As such, the employer may be adversely affected by my recommendation. I have notified the employer of my tentative findings and have received a response. I enclose copies of this correspondence. In my view, the response of the employer does not constitute an objection on the merits of the issues to be considered.

Issues

The issues investigated in this complaint were:

1. Is there significant new evidence to reconsider the decision of the adjudicator not to re-open Mr. Rahn's claim in 1979?

2. Did the Board err in not assessing Mr. Rahn's pension under the loss of earnings method?

3. Was the decision not to award Mr. Rahn a pension for his hearing loss unjust?

Proposal - S.14(2)

1. The decision not to reopen Mr, Rahn's Claim

In my opinion there is significant new evidence to reconsider the decision to deny reopening of Mr. Rahn's claim in 1979.

(a) As Mr. Rahn's physician, [redacted], was of the opinion that Mr. Rahn's disability in 1978 was related to his 1951 incident, my investigator contacted Dr. [redacted] to ascertain the basis for his opinion. Attached is a copy of the questions posed to Dr. [redacted] and a copy of his reply. Of significance are his opinions that:

(i) the injury increased the rapidity of the degeneration;

(ii) there is a 50% chance that the repeated injuries accelerated the disability in spite of the dorsal kyphosis.

(b) In 1979, Dr. [redacted] did not give the Board the basis for his opinion that Mr. Rahn's problems in 1978 were due to his injury. The above provides the reasoning for his opinions. The opposing medical opinion at the time was that of Dr. [redacted], in his memo of February 13, 1979. His opinion was that "the incident, in all probability, caused an aggravation of a degenerative disc at the L4-5 level, and symptoms were relieved by surgery at that level on two occasions". He also felt that the marked kyphosis in Mr. Rahn's lower dorsal region would by itself cause an increase of stress through his degenerate lumbar spine, and would be responsible for his discomfort, particularly in the erect position.

In view of the fact that the new evidence came to light after the decisions in 1979 and 1980, I propose, pursuant to S.14(2) of the Ombudsman Act, that the Board reconsider the decision to deny the reopening of Mr. Rahn's claim in 1979.

2. Assessing the pension under the loss of earnings method.

Grounds for Adverse Findings

In my opinion, this complaint may be substantiated on the following grounds:

a. Prior to the 1951 back injury, Mr. Rahn worked as a logger, faller and bucker. After his first operation in 1955 he changed his occupation to that of light mechanical work. He states that his income was reduced by more than 50% as a result. A list of his employment after his operation is included in his letter of November 17, 1978 to the Board.

b. Dr. [redacted] reported to the Board on December 20, 1960 that "there is without question some decrease in his earning ability and his ability to perform his usual work. He is an excellent citizen, well motivated and is doing relatively well so far."

c. On January 4, 1961 Dr. [redacted] reported to the Board that "examination revealed mild restriction of both back movements and straight leg raising but I told him that with two episodes such as he has had I felt that he was doing fairly well and that he would just have to restrict himself in the future. If this is going to mean a change of work and a reduction in salary, I believe the Board should review his case and consider the possibility of permanent partial disability."

d. Section 24(1)(c) of the Workers Compensation Act in 1973 stated:

> "Where the Board deems it more equitable, the Board may award compensation for permanent disability having regard to the difference between the average weekly earnings of the workman before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury, and the compensation shall be a periodical payment of 75% of such difference, and regard shall be had to the workman's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business."

e. This section was first introduced as an amendment to the Workers Compensation Act in 1954. Prior to this date, the previous legislation, retroactive to 1917, had a similar provision for loss of earnings assessments. The Board did not institute the "dual system" for spinal injuries until 1973, and extended it in 1977 to other types of injuries.

f. According to the Disability Awards Manager, if a claimant was awarded a pension prior to 1973 for a spinal injury (but after 1954 when the amendment came into force) the Board would not consider the pension under the "dual" system at that time or even after 1973, unless the claimant's physical disability had increased. Upon coming into force, the amendment gave the Board the discretion which it did not previously have. Failure to exercise a discretion is an unlawful declining of jurisdiction. It would not appear that the Board exercised its discretion from 1954 to 1973 (for spinal disabilities) and to 1977 (for non-spinal disabilities).

Based on the above findings, I may conclude that the Board's failure to exercise its discretion in applying section 24(1)(c) of the Act (1973) to determine the amount of Mr. Rahn's pension award was contrary to law.

Possible Recommendations

I have not yet reached a final conclusion on this complaint, and I would appreciate your comments on the grounds set out above. In order to assist you in focusing your response the following recommendation is open to me:

> That the Board reconsider Mr. Rahn's pension award, taking into account section 24(1)(c) of the Workers Compensation Act in effect in 1973.

Conclusion - Hearing claim:

In my opinion the complaint is not substantiated for the following reasons:

1. On October 31, 1978 Dr. [redacted] wrote to Dr. [redacted] that Mr. Rahn had fallen and banged the right side of the back of his head approximately one month previous. Following this, Mr. Rahn became aware of rotatory vertigo and had similar attacks. Dr. [redacted]'s opinion was that Mr. Rahn had a "notched type of hearing loss compatible with noise exposure which he gave in his history." His conclusion was that Mr. Rahn suffered benial positional vertigo secondary to the head injury and also noise induced hearing loss.

2. An audiogram subsequently performed at the Board's Hearing Branch showed that Mr. Rahn had a pure tone average hearing loss of 20 db in the right ear and 30 db in the left ear.

3. In order to be considered for a hearing pension for a non-tramatic hearing loss, Schedule D of the Workers Compensation Act requires a minimal hearing loss of 28 db in one ear.

4. The Board concluded that the most logical explanation for the slight asymmetry worse in the left ear was Mr. Rahn's history of a head injury. It was therefore recommended that the claim be adjudicated on the basis of the right ear applied to both ears. As a result, the hearing loss in the right ear was not sufficient to award Mr. Rahn a pension.

5. My investigator contacted Dr. [redacted] to determine his opinion on whether Mr. Rahn's head injury was the cause of the slight asymmetry worse in the left ear and whether in his opinion it would be equally possible that the exposure to excessive noise alone caused the slight asymmetry.

6. Dr. [redacted] replied that he did not think there was any positive way of saying that Mr. Rahn's head injury was or was not the cause of the slight asymmetry. He had no other explanation apart from noise exposure and head injury. It was his opinion that, in general terms, although it certainly could be argued that the exposure to noise could be the cause of the hearing difficulties, it was more likely that his hearing problem was from the head injury as it appeared to be accompanied by dizziness.

7. Section 99 of the Workers Compensation Act states that where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker. In this particular case, it would seem that the possibilities are not evenly balanced.

Karl A. Friedmann

Karl A. Friedmann
Ombudsman
July 29, 1983.

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
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Telephone 273-2266
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SEP 23 1983
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22 September 1983

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 81-1788

Dear Dr. Friedmann:

RE: John RAHN
Claim No. XC51020694 & XH78251247

Your letter dated July 29, 1983, has been considered by a panel of two Commissioners.

With regard to your proposal under Section 14(2) of the Ombudsman Act, the Commissioners note that the last decision on the claim was the board of review decision of October 31, 1980. Under normal procedures, this means that any request for reconsideration must be directed to the board of review. The Commissioners are, however, on the basis of the arguments and information you have provided, prepared to grant Mr. Rahn an extension of time to appeal to them against the board of review decision. They are referring the claim to the Registrar's Office to deal with the appeal in the normal way.

When the dual system for assessing permanent partial disability awards was introduced in respect of spinal disabilities, it was made retroactive to existing awards. A survey was carried out of existing pensioners under the new system. However, some eligible claimants were missed in this survey because, as in Mr. Rahn's case, they were no longer actually receiving pensions. They had had term awards which expired. Mr. Rahn is, therefore, now eligible for assessment under the dual system. There seems to have been some misunderstanding between the Disability Awards Manager and your office on this point.

continued...../2

RE: John RAHN
Claim No. XC51020694
and XH78251247

22 September 1983

In the result, the Commissioners are agreeable to your proposals to the extent of allowing an appeal to them to proceed on the decision not to re-open the claim in 1979 and directing an assessment of Mr. Rahn's pension under the dual system.

Yours truly,

N. C. Attewell

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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000079

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

File: 81-1788

October 24, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: John Rahn, Claim No. XC51020694

Thank you for your letter of September 22, 1983 regarding Mr. Rahn. I have notified Mr. Rahn that you are prepared to grant him an extension of time to appeal against the board of review decision.

I appreciate your accepting my proposed recommendation that Mr. Rahn's pension be assessed under the loss of earnings method. However, I understand that this assessment will only be effective as of 1973, the year when the Board instituted its policy regarding the dual system for spinal disabilities.

In my findings dated July 29, 1983 I made reference to the fact that the section giving the Board discretion to assess a disability according to a worker's loss of earnings was first introduced as an amendment to the Workers Compensation Act in 1954, and that it did not appear that the Board exercised its discretion from 1954 to 1973 for spinal disabilities. As well, prior to 1954, the previous legislation (retroactive to 1917) had a similar provision for loss of earnings assessments, and the Board's discretion was not exercised during this time.

I note that in Mr. Relkoff's case, the Commissioners have disagreed with a similar recommendation to the one I made in Mr. Rahn's case. In Mr. Relkoff's case, the Commissioners stated that applying the dual system prior to 1977 or 1973 would have the potential of the Board reopening and reviewing every non-spinal pension award since 1917, and referred to the [redacted] case. In this case, the Commissioners wrote to me on March 30, 1981 that they decided not to make the extension of the dual system retroactive to pensions assessed prior to 1977 because it would involve enormous problems and costs associated with continually changing old decisions in light of changing practices and laws. Specifically, the Commissioners stated in their letter to me of March 30, 1981:

> "When the Workers' Compensation Act is changed or the Board alters its previous practice so as to increase the benefits payable to workers, the question always arises as to whether the change should be made retroactive or should only apply after a certain date. No general rule can be laid down as to which is the best course of action since the approach taken in each case probably depends to a large extent on the particular circumstances. However, it will frequently happen that a date is set at which the change is to commence with the result that persons whose claims were dealt with previous to that date do not obtain the benefit of the change. Even though there may be no essential difference between claims dealt with before and after that date, it is felt undesirable to make the change retroactive. The previous claims having been properly dealt with on the basis of the law and practice as it then was, it cannot be said that claimants have been dealt with unfairly. Furthermore, there would be enormous practical problems and costs associated with continually changing old decisions in light of changing practices and laws..."
>
> "The Commissioners can see that it might be justifiable to make an increase in benefits retroactive when the existing benefits were perhaps felt to be generally inadequate. However, the same justification does not apply when the existing policy is generally considered proper, but a change is made to cater to some exceptions."

With respect, I would point out that whatever enormous problems and costs there may be associated with continually changing old decisions in light of changing practices and laws, that in Mr. Rahn's case, the law has not changed since Mr. Rahn was awarded a pension on a functional basis in 1960. It has been the Board's practice or policy that has changed although the law has remained the same. It is the governing statute that policies must abide by. Therefore, I do not see why Mr. Rahn should be treated any differently from a person who was assessed for a pension after the Board adopted a new policy.

The fact that the Board did not exercise its discretion from 1917 to 1973 regarding the loss of earnings method appears to be a fettering of its discretion. In this regard, DeSmith in "Judicial Review of Administrative Action" has stated the following:

> "A tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it; but its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs at all." Page 311.
>
> "A public authority cannot effectively bind itself not to exercise a discretion if to do so would be to disable itself from fulfilling the primary purposes for which it was created. It has been said that 'if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or duties.' So to act would be 'to renounce a part of their statutory birthright'." Page 317.
>
> "One begins with the elementary proposition that courts and tribunals have a duty to determine cases within their jurisdiction and properly brought before them, and that courts, tribunals and administrative bodies in general have a duty to exercise their statutory discretions one way or the other when the circumstances calling for the exercise of those discretions arise." Page 543.
>
> "The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner." Page 285.

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I had earlier asked the Board to reconsider Mr. Rahn's pension award, taking into account S.24(1)(c) of the Workers Compensation Act in effect in 1973. As there was no difference between the 1973 and 1960 legislation, I felt that consideration of the 1973 legislation would enable the Commissioners to consider Mr. Rahn's loss of earnings since 1960.

Since you have accepted my recommendation in part, the purpose of this letter is to clarify the proposed recommendation I made on July 29, 1983, and to allow you the opportunity to make any representations. Based on the above findings, I may conclude that the Board's failure to exercise its discretion in applying Section 22(1)(c) of the Act in effect in 1960 when determining the amount of Mr. Rahn's pension award was contrary to law.

I am considering making a recommendation that the Board reconsider Mr. Rahn's pension award taking into account Section 22(1)(c) of the Workers Compensation Act in effect in 1960. As the Commissioners have already agreed that Mr. Rahn is eligible to have his pension assessed under the "dual system" from 1973, my recommendation would cover the assessment of Mr. Rahn's pension under the dual system from 1960 to 1973.

I would appreciate your comments on the grounds set out above. I apologize for any inconvenience that may have been caused by the ambiguity in my previous proposed recommendation.

Yours sincerely,

Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
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OFFICE OF THE COMMISSIONERS

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12 December 1983

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West 6th Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 81-1788

Dear Dr. Friedmann:

RE: John RAHN
Claim No. XC51020694 & XH78251247

Your letter dated October 24, 1983, has been considered by the Commissioners.

You are proposing that Mr. Rahn's award under the dual system be made retroactive to 1960.

The Board's present practice of assessing pensions under the dual system was initiated in 1973 for spinal awards. This change in practice was applied to existing pensioners, but the additional awards were not made retroactive to the commencement of the claimant's original pensions. No exception could be made in Mr. Rahn's case without also doing the same for all persons receiving spinal pensions at the time the dual system was introduced. The Commissioners note your arguments suggesting that the Board prior to 1973 failed to exercise its discretion under the predecessor sections of Section 23(3). However, the Commissioners remain of the view that the Board acted properly in not making awards under the dual system for the period prior to when the system was introduced. They feel that the comments made in my letter of March 30, 1981, which you quote in your letter are valid.

The Commissioners would also point out that the enactment of Section 24 of the Workers' Compensation Act seems to indicate a recognition by the legislature of the fact that projected

continued...../2

RE: John Rahn
Claim No. XC51020694
No. XH78251247

12 December 1983

loss of earnings were not available for periods prior to the introduction of the dual system. Its provisions would not seem to be necessary if dual system awards could be made retroactive in the way you suggest. Section 24(11) sets commencement dates for projected loss of earnings awards made under that section which will in no case be before September 1, 1975.

Your proposal was discussed at the meeting between Mr. Bucher and your staff on November 24, 1983. It was there asked by your staff whether the Board would be willing to backdate Mr. Rahn's award to some time prior to 1973 but after 1960. The Commissioners cannot agree to this. Again, it could not be done in Mr. Rahn's case without doing it for all other claimants. There would then be a de facto change in the date set by the Board's practice, but this date would be no more fair or logical than the date already set. It could be met by even more demands to take the date even further back in time. The date presently in use is the most reasonable, as being the time when the new practice was actually instituted and the Commissioners feel that it is necessary to adhere to that date.

In the result, the Commissioners are unable to accept your proposal. No change will be made in the Board's practice governing the commencement of dual system awards either generally or in respect of Mr. Rahn's case.

Yours truly,

N. C. Attewell

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

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000085

File: 81-1788

February 10, 1984

Mr. W. Flesher,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Mr. John Rahn, Claim No. XC51020694

I have reviewed Mr. Attewell's letter of December 12, 1983 concerning Mr. Rahn.

I have the following comments:

1. The Commissioners state that no exception could be made in Mr. Rahn's case without also doing the same for all persons receiving spinal pensions at the time the dual system was introduced.

   The impossibility of doing justice for every claimant does not justify the refusal to do justice for any. I stated in my letter of November 29, 1983 concerning Mr. Relkoff that I was not recommending that the Board re-assess every non-spinal pension since 1917; I restricted my recommendation to those claimants who have made complaints to my office. Similarly, in Mr. Rahn's case, I am not recommending that the Board re-assess every spinal pension received by persons at the time the dual system was introduced for spinal pensions.

2. The Commissioners are of the view that the Board acted properly in not making awards on the basis of projected loss of earnings for the period prior to when the dual system was introduced, and that the comments made in Mr. Attewell's letter of March 30, 1981 are valid.

Mr. Attewell stated in his letter of March 30, 1981 that when a practice is altered to increase benefits to workers, claimants are not dealt with unfairly if their claims had been properly dealt with on the basis of the law and practice as it then was. In my letter of October 24, 1983 I pointed out that, contrary to this statement, the law had not changed since Mr. Rahn was awarded a pension on a functional basis in 1960. Therefore, Mr. Rahn has been treated unfairly because, although his claim was dealt with on the basis of the practice as it then was, the practice did not conform with the law. Accordingly, although Mr. Attewell's comments may be valid, they do not apply to Mr. Rahn's case.

3. The Commissioners point out that the enactment of Section 24 of the Workers Compensation Act seems to indicate a recognition by the Legislature of the fact that projected loss of earnings were not available for periods prior to the introduction of the dual system. Further, the Commissioners state that the provisions of Section 24 would not seem to be necessary if dual system awards could be made retroactive in the way I suggest.

To determine why Section 24 was introduced, my investigator spoke with Mr. Terry Ison, who was Chairman of the Board at the time that Section 24 was introduced and enacted.

Mr. Ison explained that the Board was concerned about old pensions because, although pensions were adjusted for inflation starting in 1966, pensions awarded prior to 1966 did not have C.P.I. adjustments. In order to find out what would be required to upgrade old pensions to cover earnings loss, the Board conducted a survey. This survey showed that, in most cases, earnings loss was adequately covered by compensation, but in some cases, it was not. Therefore, the Board concluded that there was no sense in upgrading all pensions by a certain percentage; rather, more individual selection was needed. Accordingly, Section 24 was developed.

My investigator asked Mr. Ison whether the review under Section 24 could not have been performed under S.23(3). Mr. Ison agreed that this is correct legally, on the basis of the Board's power to reopen, as well as the provisions of S.23(1) and S.23(3), and that Section 24 was not technically necessary to accomplish this review. However, he stated that from the point of view of "practical politics" the introduction of S.24 was seen as desirable. Mr. Ison mentioned such considerations as the fact that S.23(1) and S.23(3) did not use the word "projected" in describing the loss of earnings assessment, and therefore it was possible to interpret Section 23 to require an "actual" (rather than "projected") loss of earnings. The Board wished to avoid a debate which could have resulted from this ambiguity. Since Section 24 specifically gave the Board authority to use a "projected" loss

of earnings method, there would be no doubt as to which method would be used. Secondly, the Board considered that, although it had the legal authority to make changes regarding the review of pensions, this was a large departure from past practice (which was that pensions stay as initially assessed for life, except upon deterioration of the compensable condition). Therefore, the Board felt that this was a matter for the Legislature. Thirdly, the Board felt that a new section would forestall any questioning of the Board's authority to review pensions in this way.

Therefore, S.23(3) and its predecessors, which were in effect long before the introduction of the dual system, gave the Board legal authority to use its discretion to assess loss of earnings where the Board considered it "more equitable". Because of the existence of S. 23(3), Section 24 was not legally necessary in order to review pensions under the dual system prior to 1973. However, it was seen as desirable in order to resolve ambiguity in Section 23 and generally to show that there was Legislative approval of this significant change in practice.

I have therefore concluded that the Board's failure to exercise its discretion in applying Section 22(1)(c) of the Act in effect in 1960 when determining the amount of Mr. Rahn's pension award was contrary to law. Pursuant to Section 22 of the Ombudsman Act, I recommend that the Board reconsider Mr. Rahn's pension award taking into account Section 22(1)(c) of the Workmen's Compensation Act in effect in 1960.

May I please have your response to my recommendation at your earliest convenience?

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
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OFFICE OF THE COMMISSIONERS

19 April 1984

Dr. Karl A. Friedmann
Ombudsman
Legislative Assembly of
British Columbia
#202 - 1275 West 6th Ave.
Vancouver, B.C.
V6H 1A6

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Dear Dr. Friedmann:

Re: John RAHN
Claim No. XC51020694

Your letter dated February 10, 1984, has been considered by the Commissioners.

The Commissioners have concluded that their position set out in my previous letters to you on this matter was correct and that you have provided no grounds for any change.

Your suggestion that the Board could restrict any retroactive application of the projected loss of earnings method to persons who have complained to your office has already been replied to in connection with Mr. Relkoff's claim. The Commissioners feel that your proposal would involve an unfair discrimination by the Board in favour of a particular group of workers which it would not be proper for the Board to adopt.

The Commissioners note your report of the conversations your investigator had with Mr. Ison and the conclusions you draw from them. It seems to the Commissioners that, notwithstanding that the Board might possibly have fulfilled the purpose behind section 24 without obtaining the enactment of that section, the significant fact is that it did obtain a statutory amendment for this purpose. By enacting Section 24 the Legislature has declared its policy with regard to the application of the projected loss of earnings method to old pensions. It would not be proper for the Board to now alter this policy.

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Re: Claim No. XC51020694 19 April 1984

In the result, the Commissioners have decided to reject your recommendation. The Board will not reassess Mr. Rahn's pension on a projected loss of earnings basis in respect of the period prior to 1973.

Yours truly,

N.C. ATTEWELL
Secretary to the Board

NCA:hb

Legislative Assembly
Province of British Columbia

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202, 1275 West Sixth Avenue
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File: 82-6640

June 24, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Mr. Relkoff, W.C.B. Claim #'s 4520912 & 4869377

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

FINDINGS

of the Ombudsman concerning a complaint against the Workers' Compensation Board by Mr. William Relkoff.

Background:

Mr. Relkoff was severely injured at work in 1945 when he was 21 years old. A falling log struck him over the back and right shoulder, throwing him to the ground so that the right side of his face struck a stone. He suffered a fracture at the base of his skull with a marked concussion, lost the vision in his left eye, the hearing in his left ear and also suffered a left leg injury. In 1947 he was awarded a pension of 50% of total which amounted to $32.57 per month based on his monthly wage of $130.00 at the time of injury. The pension was for his leg, hearing, and vision disabilities. At the time of his injury he had been working as a logger for one and half days. Previously, he had worked at various jobs since he was 14 years old.

Mr. Relkoff was injured again in 1948 when he sprained his left ankle. At the time of this second injury, he had worked as a logger for two days and was earning $60 a week. This second injury was accepted as an aggravation of his original injury and in 1950 the Board awarded Mr. Relkoff an additional 5% pension for his left leg. This amounted to an additional $2.03 per month. At the time of re-assessment, the Board again used Mr. Relkoff's monthly earnings of $130 in 1945.

Mr. Relkoff was re-assessed again in 1955 and awarded an additional 8.4% of disability which gave him an additional pension of $6.47 per month. Again, this was based on his monthly wage of $130 per month.

On August 25, 1956, Mr. Relkoff applied to the Board to be examined by Dr. [A] , a specialist under section 54(A) of the Workmen's Compensation Act. This was on the basis that he was suffering from a greater functional disability than that found by the Board.

After Dr. [A] 's certificate, the Medical Review Committee's recommendation to the Board was to leave the claim as final. The Board wrote to Mr. Relkoff on April 2, 1957 advising him that no change had been made in the status of his claims as a result of his examination under section 54(A).

Employer Involvement:

There has been no employer objection contained in Mr. Relkoff's files and in fact there are notes in the Board's file that the employer's firm number is not active. Therefore, my office has not contacted the employer.

Issues:

1. Was the Commissioners' decision of May 20, 1982 to backdate Mr. Relkoff's additional 25% award for cerebral dysfunction to 1973 based on mistakes of fact?

2. Were the decisions to use Mr. Relkoff's monthly earnings in 1945 of $130 per month to calculate his pension entitlement in 1947, 1948 and 1980 unjust?

3. Did the Board err in not assessing Mr. Relkoff's pension under the loss of earnings method since 1945?

4. Did the Board err in not compensating Mr. Relkoff for his loss of equilibrium?

5. Did the Board err in not compensating Mr. Relkoff for his bladder and kidney problems?

Grounds for Adverse Findings:

Issue #1: Decision to back date Mr. Relkoff's 25% award for cerebral dysfunction to 1973

1. The Commissioners consider, in their decision of May 20, 1982, that there is some inconsistency in the majority board of review decision. The inconsistency, according to the Commissioners, was that although the board of review indicated that Mr. Relkoff's total unemployability occurred in 1973 as a result of a deterioration in his physical condition, there was no evidence of any such deterioration occurring at that specific time. Further, although the boards of review concluded that Mr. Relkoff's cerebral dysfunction had existed unchanged since 1957 and even the Disability Awards Officer felt that it had existed unchanged since 1968, Mr. Relkoff clearly was not unemployable in 1957 and 1968 since he did work subsequent to those dates. Therefore, the Commissioners wrote to Mr. Relkoff that: "the only way of resolving this inconsistency would appear to be to conclude that the Disability Awards Officer made an error in backdating your additional 25% award to 1968. It should have commenced in 1973 when you first became unemployable. The Commissioners note that there was no positive evidence of an onset of

On July 9, 1980 Mr. Relkoff applied for a pension review under section 24 of the Workers Compensation Act. As well, his compensable injuries were reassessed and the medical advisor assessed his difficulty in verbal expression and obvious memory deficit as 25% of total. The Disability Awards Officer decided on November 18, 1980 to award Mr. Relkoff an additional 25% of total disability relating to his memory deficit. This increased pension was retroactive to June 20, 1968 and was based on his earnings in 1945.

On January 14, 1981 there was a decision made regarding Mr. Relkoff's application under Section 24. The decision determined that there had been a loss of earnings. The calculations for the increased award were made on the basis that Mr. Relkoff could be earning at least $5/hour as a security guard. Mr. Relkoff appealed both these decisions to the boards of review.

The boards of review, in a majority decision, upheld Mr. Relkoff's appeal on March 3, 1982. They recommended that Mr. Relkoff's cerebral dysfunction award of 25% of total be retroactive to February 9, 1957, the date of the certificate of the specialist under section 54(A). They also recommended that since Mr. Relkoff was totally disabled from any meaningful work, his reassessment should be based on the hourly wage rate of a security guard rather than his pre-injury earnings in 1945.

Subsequently, the Commissioners wrote to Mr. Relkoff on May 20, 1982. They provisionally concluded that the increased 25% award for cerebral dysfunction could not be made retroactive to 1957 since this would contradict the Commissioners' decision of April 2, 1957. They further concluded that Mr. Relkoff's pension would be re-assessed under Section 24 of the Workers Compensation Act on the basis that he was totally unemployable and that the additional 25% award would be recalculated on the basis of his earnings as a security guard. However, that award would commence in 1973 rather than 1968 or 1957 as decided by the Disability Awards Officer and the boards of review, because he first became unemployable in 1973.

As a result, Mr. Relkoff received a further decision dated September 15, 1982 from the Disability Awards Officer. This decision recalculated Mr. Relkoff's award from August 15, 1973 and deducted the pension he was paid under section 24 since July of 1980.

Last Decision Level:

The last decision was made by the Solicitor of Legal Services for the W.C.B. on October 22, 1982, rejecting Mr. Relkoff's application for a Medical Review Panel.

cerebral dysfunction in June 1968. That date was only fixed upon because medical reports received prior to that time indicated that there was no such disabilty. In effect, you were given the benefit of the doubt under section 99 of the Workers Compensation Act."

2. This conclusion is not correct. Prior to 1968 medical reports did indicate cerebral disability. Prior to the certificate by the specialist under section 54(A) in 1957, the evidence regarding Mr. Relkoff's cerebral disability is as follows:

a) November 8, 1945 - Dr. [redacted] reports to the Board that Mr. Relkoff is complaining of poor memory or an inability to find the right word.

b) November 13, 1945 - Dr. [redacted], neurologist, states "this boy has sustained a severe concussion with permanent cerebral damage. It is too soon to assess the final degree of mental impairment but there undoubtedly will be some degree eventually."

c) November 19, 1945 - Letter by Board doctor "it seems obvious to the Board that the claimant is going to be a 100% disability case... he will be reviewed in one year by Dr. [redacted] to determine the extent of his cerebral damage which he suffered in his accident."

d) March 29, 1946 - Dr. [redacted] - "boy states unable to remember things nearly as well as he could before the accident. He seems to think his memory has been affected by the accident".

e) May 24, 1946 - Dr. [redacted] - "memory still not very good. Cannot remember how to do things".

f) May 30, 1946 - Board doctor in letter to Dr. [redacted] - "if it is possible to make a final estimate of the degree of disability resulting from his skull fracture, we would like to do so."

g) June 19, 1946 - [redacted] - "as pointed out by Dr. [redacted], this boy sustained a moderately severe cerebral injury resulting in primary optic atrophy of the left eye. He apparently also has slight intellectual impairment (mainly in abstraction). Aside from these, I believe there is little evidence of permanent residual cerebral damage."

h) March 6, 1947 - Dr. [redacted] - "General physical and neurological exams are unchanged from my previous reports to you... his efforts to convince me that his memory was definitely and permanently affected were rather obvious in so far as he stated he was unable to remember where he was born, his age... I do not think there is any degree of loss of memory. I would think this condition is undoubtedly an anxiety state with some of the symptoms at a conscious level".

i) June 3, 1947 - PPD Exam at the Board - "Claimant talks with a bit of hesitation but there does not appear to be any aphasia. The cranial nerves other than the left eye and left ear appear normal and intact."

j) June 25, 1947 - Dr. [redacted] states that Mr. Relkoff has some loss of memory.

k) May 3, 1948 - Mr. Relkoff is examined by the Board and he complains that he cannot remember things, there are noises in his head all the time and he sometimes gets dizzy.

3. Further, even the Disability Awards Officer concluded that Mr. Relkoff's cerebral dysfunction complaints have persisted since 1947. On August 1, 1980 the Disability Awards Officer wrote: "he was last reassessed regarding PPD entitlement on June 20, 1968 at which time Dr. [redacted] recommended no change in the award. He records the worker's complaints of dizziness and headaches and loss of memory. These complaints have persisted since his original PPD exam in June 1947, although it does not appear that he has ever undergone a full assessment regarding the head injury aside from the EEG carried out by Dr. [redacted] in 1967 which was 'borderline normal'.... The worker also states that his loss of memory has increased and he suffered verbalization problems".

4. However, despite this recognition, the Disability Awards Officer relied on the finding of the Medical Review Committee in 1957 that the cerebral dysfunction complaints were not disabling to reach her conclusion that Mr. Relkoff's award should be made retroactive to 1968. On October 17, 1980 the Disability Awards Officer's memo stated "since the Medical Review Committee ruled that this condition (cerebral dysfunction) was not disabling in March 1957 we are unable to make the award retroactive to that date. The worker was examined again, however, on June 20, 1968, at which time the worker again complained of cerebral deficiency. The worker's present condition does not appear to be much changed from when he was seen on June 20, 1968; therefore, the award for cerebral dysfunction will be made effective that date."

5. Dr. [A] was the specialist appointed to examine Mr. Relkoff under section 54(A). Dr. [A] asked Dr. [redacted] to re-examine Mr. Relkoff paying particular attention to the question of cerebral degeneration or cerebral damage. Dr. [redacted] reported to Dr. [A] on December 4, 1956 that "there is no evidence of any specific intellectual deficit due to his head injury, though admittedly we do not know the original base line of his intellectual potential. His memory is good in rough tests..." He also forwarded an electroencephalography report with findings of "borderline normal, with some indication of right temporal changes which may indicate low grade irritation. The findings are suggestive but not conclusive."

6. Dr. [A] certified as follows:

Condition of the Workman - "A grossly swollen left lower leg, ankle and foot, a limitation of movement of the ankle joint, subastragaloid and mid-tarsal joint. Complete loss of vision in left eye, and partial loss of hearing in the left ear, and probably some permanent cerebral damage"

Fitness for employment - This workman at the present time is unable to do any type of work which would necessitate him being on his feet for any prolonged period of time, and of course, he is totally unfit to do any manual type of work which would require him to be on his feet.

Cause of his unfitness - Is his left lower leg, ankle and foot, and the arthritic changes in the ankle and foot, and the subastragaloid.

Extent of temporary or permanent disability - "After examining this workman, and reviewing his claim, I am inclined to agree with Dr. [redacted]'s report, that the method of assessing this workman's disability is faulty. I also agree that this workman would be much better off if his left lower leg had been amputated, as in his present state it is a handicap to him. ...on the basis strictly of a disability award, while one might think the interpretation in dollars was too low, the percentage of disability 58.4% of total would seem to be satisfactory."

7. Although one of the findings of the specialist under Section 54(A) was that the percentage of disability would seem to be satisfactory, the specialist also certified that Mr. Relkoff's condition included "probably some permanent cerebral damage".

This point was argued by Mr. Relkoff's lawyer, Mr. [redacted], in his submission to the boards of review on December 23, 1981

that "the report prepared by Dr. [A] ... did not include that Mr. Relkoff had not suffered cerebral damage. In fact, Dr. [A] . stated that there was 'probably some permanent cerebral damage'.... It is submitted that Dr. [A] did not certify that Mr. Relkoff was not suffering from a disabling cerebral deficiency. To the extent that Dr. [A] may be said to have certified that Mr. Relkoff was not suffering from a disability relative to cerebral dysfunction, he was operating beyond his jurisdiction. It was not for Dr. [A] to determine whether the after effects should have been classified as a disability for compensation purposes. That was for the Board to determine".

8. Furthermore, Dr. [A] 's statement that the percentage of disability would seem to be satisfactory is not a medical, but a legal conclusion, and therefore beyond his jurisdiction and not binding on the Board.

9. On February 21, 1967 the Chairman of the Board wrote a memo to file stating "I am not sure that we have dealt with this claim fairly.... It is my opinion that the man's award has been hewn very close to the line. I am of the opinion that this man should be brought in and referred to a neurologist...". There was subsequent Board discussion regarding this memo and it was decided that in light of the Battaglia case, the 54(A) decision would be carried out. The Battaglia case referred to was a decision of the B.C. Court of Appeal that the Board was bound by the finding of a specialist under Section 54(A). It appears that the Board at this time had its doubts about the lack of recognition of Mr. Relkoff's cerebral disability, but felt that they were bound by the S.54(A) certificate. However, as noted, the Specialist certified that Mr. Relkoff's condition included "probably some permanent cerebral damage" and the portion of the certificate which dealt with the satisfactory nature of his disability award was beyond his jurisdiction.

10. Although the boards of review decision was inconsistent in that it recommended that Mr. Relkoff's award be retroactive to 1957 and at the same time be based on his 1973 security guard wages, it seems that the error was that his wages should be reassessed on the basis of his earnings in 1971 to 1973, rather than the retroactivity of the award.

11. To base Mr. Relkoff's additional 25% award on when he first became unemployable is not consistent with Board policy. His 25% award for cerebral dysfunction should commence when the evidence shows that the cerebral dysfunction was a permanent disability, whether or not it caused him to be unemployable. In fact, the Disability Awards Officer had backdated the award

to 1968, cognisant of the fact that Mr. Relkoff had worked after 1968. The total disability award including the 25% was 79.50%, which does not require that Mr. Relkoff be unemployable. The fact that Mr. Relkoff worked after 1957 and 1968 is not inconsistent with his cerebral dysfunction having existed prior to these dates.

Based on the above findings, I may conclude that the Commissioners' decision of May 20, 1982 to backdate Mr. Relkoff's additional 25% award for cerebral dysfunction to 1973 was based on mistakes of fact. The mistakes of fact were that the Medical Review Panel had certified that Mr. Relkoff did not suffer from a cerebral disability and that no medical reports were received prior to that time to indicate such a disability. Both these assumptions were incorrect, as noted above.

Issue No.2: Decision to use Mr. Relkoff's monthly earnings in 1945 of $130/month to calculate his pension entitlement in 1947, 1948 and 1980.

1. In the decisions to reassess Mr. Relkoff's pension in 1947, 1948 and 1980, his monthly earnings of $130 per month in 1945 were used.

2. Section 25(1) of the Workman's Compensation Act in effect in 1945 stated the following:

> "The average earnings and earning capacity of a workman shall be determined with reference to the average earnings and earning capacity at the time of the accident, and may be calculated upon the daily, weekly, or monthly wages or other regular remuneration which the workman was receiving at the time of the accident, or upon the average yearly earnings of the workman for one or more years prior to the accident, or upon the probable yearly earning capacity of the workman at the time of the accident as may appear to the Board best to represent the actual loss of earnings suffered by the workman by reason of the injury, but not so as in any case as to exceed the rate of $2,500 per year: Provided that where owing to the shortness of time during which the workman was in the employment of his employer or in any employment or the casual nature of his employment or the terms of it, it is inequitable to compute average earnings in the manner hereinbefore described. In this subsection, regard may be had to the average, daily, weekly, or monthly amount which, as shown by the records of the Board, was being earned during the one or more years or other period previous to the accident by a person in the same or similar grade or class of employment".(my emphasis)

3. According to the Board's Statistical Department, the statistical average for a faller in 1944 was $181 per month.

4. In Mr. Relkoff's case, he had been working as a faller for one and a half days at the time of his first injury and for two days at the time of his second injury in 1948. There are numerous references throughout Mr. Relkoff's file pertaining to the extremely low wages he was making at the time of his first injury.

5. It would therefore seem that section 25(1) should be applied in Mr. Relkoff's case and the Board should consider Mr. Relkoff's average earnings according to the statistical average for fallers in 1944.

Based on the above findings, I may conclude that the decision to base Mr. Relkoff's pension on his earnings for one day was an unjust decision, as it did not take the intent of relevant legislation into consideration.

Issue No.3: Assessing Mr. Relkoff's pension under the loss of earnings method since 1945.

1. Prior to his 1945 injury, Mr. Relkoff, who was 21 years old at the time, had worked as a faller for one day and prior to that had worked at various jobs since he was 14 years old.

2. After his injury of 1945, his employment and earning history was as follows:

   a) November 14, 1947 he wrote to the Board advising that he was successful in obtaining employment on a trial basis as a sawmill labourer but was discharged because of his inability to accomplish the work.

   b) At the time of the 1948 injury (bucking trees) he was earning $60/week although he had only worked there for two days.

   c) In 1954 Dr. [redacted] wrote to the Board stating that since the 1948 accident Mr. Relkoff had tried to work twice, once in a mining mill and the other as a carpenter. He stated that he lasted a month at each job having to quit because of pain and swelling and that the last attempt was two years ago. He also stated that lately he had been helping his father on the farm doing chores.

   d) After 1948, Mr. Relkoff operated his father's grocery store. On March 8, 1955 Mr. Relkoff wrote to the Board that the average income from the business had been $150 per month and if the commutation request was granted then his income should be increased by $75 per month following the purchase of his half interest.

e) The Board commuted part of his pension in 1955. On July 23, 1956 Dr. [redacted] advised the Board that up until recently Mr. Relkoff had been working in his father's country store; however, due to difficulties between Mr. Relkoff and his step-mother, he had left this employment and now had no job. On July 25, 1956 a memo to the Board file stated that Mr. Relkoff "did not receive any salary during the ten years in the store, but he was allowed all the provisions he needed." In 1957 Mr. Relkoff's father died and three quarters of the property was willed to Mr. Relkoff.

f) On October 25, 1957 Mr. Relkoff's lawyer wrote to the Board that Mr. Relkoff's net income from 1952-1957 would be 15% of his gross sales. For example his net income would be an average of $139.95 per month for the four months he had operated in 1957.

g) In 1958 Mr. Relkoff advised the Board that he was still part owner of the grocery and gas station business but claimed that the industrial payroll in the district was insufficient to provide a reasonable trade.

h) On October 18, 1967 Mr. Relkoff advised the Board doctor that he did not have any income at all from his ex-store. He stated that he was forced out of business because of the chain stores coming in and he had not been drawing anything from the business lately and that he had no other source of income.

i) On June 27, 1968 Dr. [redacted] wrote to the Board that Mr. Relkoff operated his grocery business from 1949 until 1963. At this time he could not carry on and closed down his business and went onto welfare.

j) Between 1967 and 1971 Mr. Relkoff did no actual work.

k) Mr. Relkoff began work as a security guard in 1971 until approximately 1973 and has not worked since 1973.

3. In 1943 the Workmen's Compensation Act was amended. Section 20(1) of the Act stated:

> "Where a permanent partial disability has resulted or results from the injury, the compensation shall be a periodical payment to the injured workman equal in amount to 66 and two thirds percentum of the difference between the average earnings of the workman before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the

accident, but where the Board has deemed or deems it more equitable the impairment of earning capacity may be estimated from the nature and degree of the injury having regard to the workman's fitness to continue in the employment in which he was injured or to adapt himself to some other suitable employment or business, and the compensation shall be payable during the lifetime of the workman or such other period as the Board may fix."

4. Section 44 of the amending Act of 1943 stated the following:

> "The amendment to sub-section (1) of section 20 shall be retroactive and shall be deemed to have come into force on the first day of January, 1917..."

5. Although this section was retroactive to 1917, the Board did not institute the "dual system" for spinal injuries until 1973, and extended it in 1977 to other types of injuries.

6. According to the Disability Awards Manager, if a claimant was awarded a pension prior to 1973 for a spinal injury the Board would not consider the pension under the "dual system" at that time or even after 1973, unless the claimant's physical disability had increased.

7. Upon coming into force, the amendment gave the Board the discretion which it did not previously have. Failure to exercise a discretion is an unlawful declining of jurisdiction. It would not appear that the Board exercised its discretion from 1917 to 1973 (for spinal disabilities) and to 1977 (for non-spinal disabilities).

Based on the above findings, I may conclude that the Board's failure to exercise its discretion in applying section 20(1) of the Act (1943) to determine the amount of Mr. Relkoff's pension award was contrary to law.

Issue No.4 - S.14(2) Proposal

1. Mr. Relkoff first complained about a loss of equilibrium and dizziness on May 3, 1948. At that time, the Board decided that he had no increased disability. Since that time, Dr. [redacted] reported to the Board on March 18, 1959 that he could find no objective evidence to substantiate his complaints. On June 20, 1968 the Board doctor found that Mr. Relkoff showed "a normal Romberg and a good sense of position".

2. On June 18, 1981 Dr. [redacted] asked the Board "whether the percentage of disabilities assigned in regard to the left ear disability is related to hearing impairment, loss of

equilibrium, or both". The Disability Awards Officer replied on July 17, 1981 that "for the deafness in the left ear, covering reduced hearing as well as equilibrium, an award of 3% of total was granted".

3. Notwithstanding the Disability Awards Officer's reply, it is not apparent from the file that the loss of equilibrium was included in the 3% awarded for the deafness in the left ear. My investigator was also informed that it was the Disability Awards Officer's (Ms. [redacted]) recollection that the loss of equilibrium was included in the 25% cerebral dysfunction award. However, in the P.P.D. exam of October 8, 1980, Dr. Dewar concludes that "assessment of the difficulty in verbal expression and the obvious memory deficit was considered in relation to the recommendations in the AMA guide (pages 64 and 65) and on this basis was thought to correspond to an overall 25% of total". Pages 64 and 65 of the AMA guide under "Communication Disturbances" make no reference to a loss of equilibrium being included in the assessment of disability. Therefore, it does not appear that the loss of equilibrium was included in either the loss of hearing or the cerebral dysfunction award.

4. The Disability Awards Manager advised my investigator that a traumatic hearing loss disability award does not automatically include a loss of equilibrium but that this would be a separate consideration.

Therefore, as it does not appear that Mr. Relkoff's loss of equilibrium complaints are included in either the cerebral dysfunction or the loss of hearing portions of his disability award, I propose, pursuant to S.14(2) of the Ombudsman Act, that the Commissioners consider:

(1) Whether Mr. Relkoff has been compensated for his loss of equilibrium, and if so, on what basis?

(2) If he has not been compensated for his loss of equilibrium, that the Commissioners consider whether his loss of equilibrium constitutes a disability for which he should be compensated.

Possible Recommendations

I have not yet reached a final conclusion on the complaints, and I would appreciate your comments on the grounds set out above. In order to assist you in focusing your response the following recommendations are open to me.

1. That the Board award Mr. Relkoff a 25% disability pension for cerebral dysfunction retroactive to 1947 when Mr. Relkoff was originally awarded a pension, with interest.

2. That the award be based on the statistical earnings of a faller in 1944.

3. That the Board calculate Mr. Relkoff's pension on a loss of earnings basis since 1947.

4. That the Board recalculate Mr. Relkoff's S.24 entitlement as of 1980 on a projected loss of earnings basis. This pension was cancelled on the basis that Mr. Relkoff was receiving a 100% disability pension on a loss of earnings basis effective 1973. However, if my first recommendation is accepted, this will mean that Mr. Relkoff's pension will be based on 1945 earnings. If my third recommendation is not accepted Mr. Relkoff will not be receiving adequate compensation having regard to the projected loss of income from his disability, and should be eligible to have his S.24 application in 1980 recalculated.

Issue No.5

1. Mr. Relkoff first reported that his bladder was affected by the accident at an examination by the Board doctor on September 24, 1945.

2. On November 13, 1945, Dr. [redacted] reported his urination as "normal".

3. Mr. Relkoff consulted other doctors regarding his bladder and kidney problems over the years, but none of these doctors reported to the Board that Mr. Relkoff's problems constituted a disability or lessened his capacity for working.

4. On December 4, 1956 Dr. [redacted] wrote to the Board that Mr. Relkoff complained of having to pass water 7-8 times during the day and 1-2 times every night, and that this had been present ever since the accident. Dr. [redacted] concluded that "the reduced bladder capacity and the possible contraction of the neck of the bladder were evidently not present in 1945 as I questioned him directly about urination then or in 1946, when Dr. [redacted] questioned him". This may be incorrect as Mr. Relkoff complained to the Board about his bladder two months prior to Dr. [redacted] examining him (points 1 and 2 above).

5. On June 22, 1967 the Board advised Mr. Relkoff that his bowel and bladder complaints were not accepted as a Board responsibility. There was no reason given for this decision but presumably it is because of Dr. [redacted]'s report dated December 4, 1956 (Point #4 above).

Although the decision not to accept responsibility for Mr. Relkoff's bowel and bladder complaints may not be correct, I have decided to discontinue my investigation into this complaint as, in my opinion, there would be no benefit to Mr. Relkoff. Even if the bladder and bowel complaints were accepted as Board responsibility, there is no evidence to support that these complaints have disabled Mr. Relkoff. As compensation is not payable unless an injury disables a worker from earning full wages at the work at which he was employed, there would be no benefit to Mr. Relkoff in my continuing this aspect of the investigation.

Karl A. Friedmann
Ombudsman

June 24, 1983

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

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VANCOUVER

14 September 1983

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 82-6640

Dear Dr. Friedmann:

RE: William RELKOFF
Claim Numbers XC45020912 & XC48069377

Your letter dated June 24, 1983, has been considered by the Commissioners.

Their comments on your proposals are set out below.

1. Whether the 25% cerebral award should be made retroactive to 1947

There is no question that, as you point out on page 4 of your letter, there is evidence of cerebral impairment immediately following the 1945 injury. However, this is not really of great significance since the major issue is the effect of the specialist's certificate of February 9, 1957, which was under the then Section 54A legally binding, and the validity of the Commissioners' decision of April 2, 1957, which followed it. The question that must be asked is whether the Commissioners' decision was a reasonable interpretation of that certificate. The Commissioners think that it was.

Under clause A of the certificate, the specialist creates some uncertainty by saying that there was "probably some permanent cerebral damage". In practical terms, the word "probably" is, however, sufficient to bind the Board to accept that some compensable problem did exist. However,

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that in itself does not end the matter since the specialist failed to mention the cerebral condition in points B, C and D of his certificate. He did not, it seems, regard it as of sufficient significance to be a factor in disabling Mr. Relkoff from work. It would, therefore, be reasonable for the Board to conclude that, though there was some cerebral impairment, no percentage of disability should be awarded because the impairment was not of sufficient significance to affect Mr. Relkoff's earning capacity.

Moreover, the specialist specifically approved the 58.4% of disability awarded by the Board. You argue that the percentage of disability is a legal matter outside the specialist's jurisdiction, which is, of course, the present practice. However, unlike the present Section 61, Section 54A did not specifically prohibit the specialist from determining the extent of disability in percentage terms. Nor does it seem to the Commissioners that the percentage of disability is so obviously a non-medical matter as to be clearly outside the specialist's jurisdiction. In practical terms, the percentages of disability are largely arrived at by the Disability Awards Medical Advisers and only marginal adjustments are made by Disability Awards Officers. Even if the specialist's approving the percentage is not stricly binding, it is surely of significance and something which the Board could reasonably consider.

The Commissioners have, therefore, concluded that there should be no change in their decision not to make Mr. Relkoff's cerebral award retroactive to 1947.

2. <u>Whether the pension should be based on Mr. Relkoff's earnings at the time of his 1945 injury or a class average</u>

Mr. Relkoff had, at the time of injury been employed as a faller for 1-1/2 days at a wage of $36 a week ($156.00 per month). His pension was based on a wage of $130.00.

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The Commissioners have carefully reviewed the file, but can find no clear explanation of how the figure of $130.00 was reached. However, the most likely explanation is that the claimant had, in general, a very poor earnings record and probably had no earnings at all in the year before the injury. The $130.00 was set as a purely arbitrary rate. The Commissioners are advised that this was a not uncommon practice at the time. To support this theory, they would point to question 19 of Mr. Relkoff's application for compensation. The question asks for one year and three months' earnings but Mr. Relkoff drew in lines suggesting he had no earnings. Letters were sent to the claimant on July 10 and August 14, 1945, requesting past earnings but no satisfactory reply was received. One T4 slip was received for $271.10 in 1942. Letters were received from Mr. Relkoff's mother on August 15, 1945, saying that he could not remember the past because of his injury and from Mr. Relkoff himself on August 27, 1945, saying that because he was young, he had not worked much. He did mention three individuals he had worked for but gave no details.

If the above explanation is correct, the Commissioners consider that the Board was generous in setting a rate of $130.00 per month. To give Mr. Relkoff the benefit of the doubt, they are prepared to have his compensation recalculated on the basis of his actual earnings rate at the date of injury. However, in view of his short time as a faller and his previous poor work history, it would not be reasonable to use the higher figure you suggest.

3. Whether Mr. Relkoff's pension should be assessed on a projected loss of earnings basis retroactive to 1947

The dual system was applied to non-spinal disabilities such as Mr. Relkoff's on October 1, 1977, and was not made retroactive. The Commissioners do not consider that it would be proper to change that decision. It could not be confined to Mr. Relkoff's case, but would have the potential of the Board

continued...../4

re-opening and reviewing every non-spinal pension awarded since 1917. This issue has already been discussed with you in connection with the claim of [redacted].

The Commissioners also wish to point out that the Disability Awards Officer erred in his decision of September 15, 1982, by making the loss of earnings award retroactive to prior to October 1, 1977. They would not now change that decision but neither would they compound the error by extending the retroactivity from 1973 to 1947.

4. Loss of equilibrium

The Commissioners' reading of the file does not make it clear whether the Board had accepted that the claimant has suffered a permanent loss of equilibrium as a result of his 1945 injury or whether it has been included in the pension awarded. They note that neither the February 1957 specialist's certificate nor Dr. [redacted]'s October 8, 1980, report appear to mention it. They have concluded that a report should be obtained from Disability Awards on this and, if necessary, an examination be carried out.

In summary, the Commissioners conclude that the Commissioners in 1957 made a reasonable interpretation of the specialist's certificate and that insufficient grounds have been provided for overturning their decision and making the award for the cerebral disability retroactive to 1947. Nor can they agree that the projected loss of earnings assessment should be made retroactive to 1947. They do, however, agree to use Mr. Relkoff's rate of pay at the date of injury as the basis for his compensation and to investigate the matter of his loss of equilibrium.

Yours truly,

N. C. Attewell

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

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File: 82-6640

November 29, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Mr. William Relkoff, Claim Nos. XC45020912 and XC48069377

Thank you for your letter of September 14, 1983 regarding the above. I understand that the Commissioners will be considering whether Mr. Relkoff has suffered a permanent loss of equilibrium as a result of his 1945 injury and, if so, whether he has been compensated for this disability. Further, I accept the Commissioners' reasoning that Mr. Relkoff's compensation be based on his actual earnings at the date of the injury rather than a class average. I have notified Mr. Relkoff that he will be hearing directly from the Board in regard to these issues. Thank you for your cooperation in these matters.

The Commissioners, however, have disagreed with my two remaining proposed recommendations. These were:

(1) that Mr. Relkoff's 25% cerebral award be made retroactive to 1947, and
(2) that Mr. Relkoff's pension be assessed on a projected loss of earnings basis retroactive to 1947.

I have considered the Commissioners' response to my proposed recommendation that Mr. Relkoff's cerebral award be made retroactive to 1947. Of significance is the argument that although the specialist who certified under Section 54A in 1957 created some uncertainty by stating there was "probably some permanent cerebral damage", the specialist failed to mention the cerebral condition in points B, C and D of his certificate (in answering "Fitness for Employment", "Cause of Unfitness" and "Extent of Temporary or Permanent Disability"). The Commissioners

interpret this as meaning that the specialist did not regard the cerebral condition of sufficient significance to be a factor in disabling Mr. Relkoff from work. The Commissioners conclude that their interpretation of the certificate was reasonable. Their interpretation is that although there was some cerebral impairment, no percentage of disability should be awarded because the impairment was not of sufficient significance to affect Mr. Relkoff's earning capacity.

I have decided, in view of the above, to modify my proposed recommendation. This modification consists of making Mr. Relkoff's 25% cerebral award retroactive to 1957 rather than to 1947. My reasons for this are:

(1) There is no evidence that Mr. Relkoff's cerebral dysfunction worsened between 1957 (or, in fact, 1947) and 1980.

(a) The early reports after his accident in 1945 mention his complaints of memory loss and "inability to find the right word" and in fact Dr. [redacted] anticipates that there would be some degree of permanent cerebral damage.

(b) Despite these complaints and symptoms pertaining to cerebral dysfunction immediately after the injury, Dr. [redacted] wrote to Dr. [A] at the time of the Section 54A decision that Mr. Relkoff's "memory is good in rough tests" and there was "no evidence of any specific intellectual deficit".

(c) After the specialist's certificate in 1957, the next examination of Mr. Relkoff was carried out by Dr. [redacted] of the Board in 1968. He found that his "memory seemed rather poor" but despite this finding concluded that he had made a complete recovery as far as his head injury was concerned except for his loss of sight and hearing.

(d) On August 1, 1980, the Disability Awards Officer stated that Mr. Relkoff's complaints of dizziness, headaches and loss of memory (as recorded in 1967) had persisted since his original PPD exam in June, 1947. In her memo of October 17, 1980 she supports her decision to make Mr. Relkoff's award retroactive to 1968 by stating that his condition in 1980 had not changed much from 1968. It would seem that the only reason the Disability Awards Officer did not make the pension retroactive to 1947 was that the Medical Review Committee ruled that this condition (cerebral dysfunction) was not disabling in March, 1957. Because 1968 was the next time Mr. Relkoff was seen by a doctor after the 1957 certificate, the Disability Awards Officer made the award retroactive to 1968, despite her recognition that Mr. Relkoff's complaints as recorded in 1967 had persisted since 1947.

(e) Dr. Michael [redacted], Mr. Relkoff's personal physician, wrote to Mr. Relkoff's lawyer on November 2, 1981. In this letter Dr. [redacted] stated:

"Clearly, this man sustained a severe head injury with brain damage, as has been recognized by the award of 1980. Clearly, his disabilities date back to the immediate time of injury, and while they would have required a few months to stabilize, would have been present consistently and unaltered since that time. In my opinion, this cerebral dysfunction would have been as disabling to the patient shortly after the accident, as they would have been in 1968 or in 1981".

In a recent conversation with my investigator, Dr. [redacted] stated that the fact that the Board has recognized Mr. Relkoff's cerebral disability in 1973 makes his cerebral disability prior to that date "res ipsa loquitur."

(f) The Disability Awards Officer, in referring the decision of the boards of review to the Commissioners, commented:

> "The boards of review have decided that the effective date of this increased award should be March 29, 1957, the date the medical specialist indicated a cerebral problem. However, it should be noted this worker was reviewed by the Section 55 medical review panel and it was their decision dated February 9, 1957, that there was no cerebral dysfunction. It is very difficult for me to believe that after a period of 12 years since the first accident this worker would have no cerebral dysfunction but one month later, would have a 25% cerebral dysfunction".

It seems to me even more unlikely that Mr. Relkoff would have had no cerebral dysfunction for 28 years after the initial accident and then suddenly have a 25% cerebral dysfunction.

(2) The Disability Awards Medical Advisor who assessed Mr. Relkoff's 25% cerebral disability in 1980, relied on the A.M.A. "Guides to the Evaluation of Permanent Impairment". However, the subject matter contained in the "Central Nervous System" portion of the Guide was not published until July 6, 1963. My investigator was advised by Board staff that prior to this Guide, the Board relied on the findings of a

neurologist in determining disability. However, it would seem that the A.M.A. Guide made a significant difference in the assessing of Mr. Relkoff's cerebral disability. Two examples from the Board file may show why I believe this to be the case:

(a) Dr. [redacted], in his examination of Mr. Relkoff in 1968 found that his disability had not increased. He did not make reference to the A.M.A. Guide. Despite finding that "this workman's memory..seems rather poor for recent events", he concluded that "the workman seems to have made a complete recovery as far as his head injury is concerned, except for the loss of hearing and vision in the left eye". Although the findings of Dr. [redacted] in 1968 and those of Dr. [redacted] in 1980 as to Mr. Relkoff's cerebral dysfunction did not differ significantly, one awarded Mr. Relkoff a 25% cerebral award and the other did not. The only difference seems to be that Dr. [redacted] referred to the A.M.A. Guide which gives specific criteria to be considered when assessing permanent impairment from brain disorders (including memory loss), while Dr. [redacted] did not.

(b) On June 19, 1946 Dr. [redacted], a neurologist, found that there was "slight intellectual impairment (mainly in abstraction)" and aside from this, believed "there was little evidence of permanent residual cerebral damage". In this same report he finds that Mr. Relkoff complained of having trouble in expressing himself at times, that he can't think of the proper word at the time, that he has difficulty in recalling peoples' names, that he is absent minded and cannot remember things he has been told to do. Yet he concludes, "Since he admits he can understand things alright, that his CNS disability boils down to that produced by loss of vision in one eye". Therefore, it is evident that the problems for which Mr. Relkoff received a 25% cerebral award in 1980, i.e. loss of memory and difficulty in verbal expression, were recognized by previous doctors. However, it is Dr. [redacted] who first mentioned and referred to the A.M.A. Guide which clearly delineates the criteria to be considered when deciding on the percentage of impairment for such problems.

(3) The majority decision of the board of review specifically concluded that Mr. Relkoff's cerebral dysfunction had existed unchanged since 1957 and even the Disability Awards Officer felt that it had existed unchanged since 1968. However, the Commissioners decided that the board of review decision was inconsistent in that it decided that Mr. Relkoff's total unemployability occurred in 1973 as a result of a deterioration in his physical condition and yet there was no

evidence of any deterioration at that time. To resolve the inconsistency, the Commissioners concluded that the Disability Awards Officer had made an error in backdating the award to 1968 and that it should have commenced in 1973 when Mr. Relkoff became unemployable. I disagree with this conclusion for the following reasons:

(a) As I stated in point 11 of page 7 of my preliminary findings dated June 24, 1983, to base Mr. Relkoff's additional 25% award on when he first became unemployable is not consistent with Board policy. His 25% award for cerebral dysfunction should commence when the evidence shows that the cerebral dysfunction was a permanent disability, whether or not it caused him to be unemployable. In fact, the Disability Awards Officer had backdated the award to 1968, cognizant of the fact that Mr. Relkoff had worked after 1968. The total disability award including the 25% was 79.50%, which did not require that Mr. Relkoff be unemployable. The fact that Mr. Relkoff worked after 1957 and 1968 is not inconsistent with his cerebral dysfunction having existed at this time.

(b) In a recent conversation with my investigator, Dr. [redacted] gave the opinion that although the cerebral disability recognized in 1980 would have been present since the injury, that a young person (Mr. Relkoff was 21 years old at the time of the injury) would be more resilient in adapting to his disability and would adapt less well as he grew older. This might explain in part why Mr. Relkoff was able to perform some jobs (albeit no jobs that taxed him at all mentally or physically) until 1973 when he would have been 49 years old.

(c) Dr. [redacted] also advised my investigator that not only is it his opinion that in Mr. Relkoff's case the cerebral disability would have dated back to the time of the injury, but that theoretically the effects of such an injury would stabilize within a matter of months to one year after the injury. He stated that only in very unusual pathology, for example, uncontrolled seizures and increased pressure on the brain, would there be a deterioration after that point. Therefore, he finds it theoretically impossible as well as disagreeing specifically in Mr. Relkoff's case that the disability would have manifested itself in 1973.

With respect to my proposed recommendation that Mr. Relkoff's pension be assessed on a projected loss of earnings basis retroactive to 1947, the Commissioners do not agree because "it would have the potential of the Board reopening and reviewing

every non-spinal pension awarded since 1917". I have addressed this issue in Mr. Rahn's case and I will add no more to that argument in Mr. Relkoff's case. In summary, the section giving the Board discretion to assess a disability according to a worker's loss of earnings was first introduced as an amendment to the Workers Compensation Act in 1954, and it does not appear that the Board exercised its discretion from 1954 to 1977 for non-spinal disabilities. As well, prior to 1954, the previous legislation (retroactive to 1917) had a similar provision for loss of earnings assessments, and the Board's discretion was not exercised during this time. I assume that the Board is not disagreeing with my finding that the Board's failure to exercise its discretion in applying Section 20(1) of the Act (1943) to determine the amount of Mr. Relkoff's pension award was contrary to law.

The Board appears apprehensive that its failure to exercise its discretion during these years may now mean that, in order to correct this failure, the Board should exercise its discretion retroactively in every case since 1917. I am not recommending that the Board re-assess every non-spinal pension awarded since 1917, and in my view, it is unlikely that the Board will be asked to do so. I have restricted my recommendations to those claimants who have made complaints to my office. Therefore, in my opinion, this apprehension is not a valid reason for refusing to correct an error, which, although complicated by the passage of time, still exists today in Mr. Relkoff's case.

Based on the above findings, I may conclude that the Commissioners' decision of May 20, 1982 to backdate Mr. Relkoff's additional 25% award for cerebral dysfunction to 1973 was unjust, in that it failed to consider the relevant factors as mentioned in this letter. Because I have changed the grounds for my recommendation as well as my possible recommendation, I would appreciate your comments on the ground set out above. In order to assist you in focusing your response the following recommendations are open to me:

1) That the Board award Mr. Relkoff a 25% disability pension for cerebral dysfunction retroactive to 1957, with interest.

2) The Board recalculate Mr. Relkoff's Section 24 entitlement as of 1980 on a projected loss of earnings basis. This pension was cancelled on the basis that Mr. Relkoff was receiving a 100% disability pension on a loss of earnings basis effective 1973. However, if the Board accepts my recommendation to award Mr. Relkoff a 25% disability pension for cerebral

dysfunction retroactive to 1957, this will mean that Mr. Relkoff's pension will be based on 1945 earnings. If the Board does not calculate Mr. Relkoff's pension on a loss of earnings basis since 1947, then Mr. Relkoff will not be receiving adequate compensation having regard to the projected loss of income from his disability, and should be eligible to have his Section 24 application in 1980 recalculated.

I have also concluded that the Board's failure to exercise its discretion in applying Section 20(1) of the Act (1943) to determine the amount of Mr. Relkoff's pension award was contrary to law. Pursuant to Section 22 of the Ombudsman Act, I recommend that:

the Board calculate Mr. Relkoff's pension on a loss of earnings basis since 1947.

May I please have your response to my recommendations and possible recommendation at your earliest convenience.

Yours sincerely,

Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

RECEIVED
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VANCOUVER

20 March 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: William RELKOFF
Claim No. XC45020912 & XC48069377

Your letter datd November 29, 1983, has been considered by the Commissioners.

There are two questions at issue.

1. Whether Mr. Relkoff's 25% cerebral award should be made retroactive to 1957.

2. Whether his projected loss of earnings award should be made retroactive to 1947.

With regard to the first matter, you argue that there is no evidence of a deterioration in Mr. Relkoff's condition since 1957, but the Commissioners are unable to agree. There is evidence of this arising from the fact that when examined in 1980 he was found to have a significant cerebral disability, whereas in 1957 he was found to have no significant disability. The Commissioners note Dr. [redacted]'s evidence, but do not feel it likely that a significant cerebral disability would suddenly have developed in 1957. They have obtained a further report from Dr. [redacted] dated January 27, 1984 (copy enclosed) which indicates that it would be reasonable to conclude that the increase in disability occurred in 1973. He also deals with the point you make regarding the A.M.A. Guide. The Commissioners are not in their decision violating Board policy by stating that the physical impairment award should commence when Mr. Relkoff became unemployable as opposed to when his physical impairment commenced. They have concluded rather that the increased physical impairment commenced in 1973 and that Mr. Relkoff's becoming unemployable at that time was simply evidence of that fact.

continued...../2

RE: William Relkoff
Claim No. XC45020912 & XC48069377 20 March 1984

With regard to the second matter at issue, there is no change in the Commissioners' position that loss of earnings pensions should not be made retroactive to before October 1, 1977, for non-spinal disabilities. They are also unable to accept that an exception should be made in favour of persons who complain to your office. This would be, in their opinion, an unjustified act of discrimination against claimants who do not complain to your office. Surely persons who complain to your office should not by virtue of that fact alone become entitled to compensation benefits to which other claimants are not entitled.

In the result, the Commissioners have decided not to accept any of the recommendations set out in your letter.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
Vancouver
British Columbia
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Telephone: (604) 736-8721

000118

File: 83-52109

April 6, 1984.

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Warren T. Ross, Claim No. XC66094141

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

Complainant: Mr. Warren T. Ross
Claim No. XC66094141

Authority: Workers' Compensation Board

Last Decision Level:

The Commissioners refused to reconsider Mr. Ross' claim in 1983 because he had not submitted any new evidence. The Commissioners did acknowledge that an error of law had arisen in reviews of the claim by a Board of Review and the Commissioners in 1973 but noted that the Board adjudicator's decision in 1967 to deny the claim was still valid because it was not based on the error of law. The adjudicator's decision had been affirmed by an internal Board of Review on April 17, 1967.

Background:

1. Mr. Ross reported an injury while employed at the Elk Falls Company Ltd. pulp mill in Campbell River on December 29, 1966. He felt a pain in his lower back when he pulled a short block off a loading conveyor with a picaroon while leaning over a waist-high railing. He received heat treatment for twenty minutes at the first aid station and returned to a different job for the remainder of the shift. Mr. Ross was unable to report to work the following day because of pain and stiffness in his back. He went to Dr. [redacted] who referred him to the Campbell River General Hospital.

2. Mr. Ross was admitted to the hospital on December 30, 1966 and remained there until January 13, 1967. Dr. [redacted] diagnosed acute disc syndrome but an x-ray revealed no sign of this or any other condition. Mr. Ross was treated with tranquilizers, traction, and physiotherapy. The physician's progress reports showed general improvement in Mr. Ross' condition through February 1967 with Dr. [redacted] stating that Mr. Ross could resume his usual employment on February 6, 1967. The report on March 6, 1967, however, indicated that Mr. Ross was fit for light duties only. Dr. [redacted] reported on March 31, 1967 that Mr. Ross was able to resume his usual employment as of April 1, 1967.

3. Mr. Ross completed his Form 6 on January 12, 1967. He described the work he was performing at the time of the injury. Mr. Ross noted that he had hurt his back on the same job on November 28, 1966 and that he had received the same heat treatment at the first aid station. The Employer's Report, also completed on January 12, 1967, acknowledged that the incident had occurred as described by Mr. Ross but indicated that the employer was not satisfied that an injury had resulted. The employer stated: "This workman has had previous back trouble. Both incidents reported do not indicate any unusual incident or over exertion other than the workman performing his normal required duties." The report confirmed that Mr. Ross had reported a back injury at the same job on November 28, 1966.

4. The Board denied Mr. Ross' claim in a letter dated February 2, 1967. The adjudicator wrote:

> In your application you have stated that on December 29, 1966, you were working on conveyor bringing in logs from the wood room to the ground wood department and while reaching over a railing with a picaroon for a short block you injured your back.
>
> In view of the above it would appear that you were doing your normal work and as nothing unusual has been described as occurring it is our opinion that this work activity on December 29, 1966, was not responsible for the back disability for which you complained and sought medical attention.

5. Mr. Ross appealed to an internal Board of Review on April 17, 1967. The appeal was denied on May 1, 1967 in a letter which stated that "we are directed to inform you that there is no change in the decision as communicated to you in our letter of February 2, 1967."

6. In July 1973 Mr. Ross asked the Board to review his file. His claim was considered by a Board of Review on August 23, 1973. In a letter of that date the Chairman of the Board of Review stated:

> It should be pointed out that at the time your claim was initiated, the Workman's Compensation Act only authorized compensation for "personal injury by accident." [original emphasis] The Board has advised you on different occasions that you have not established entitlement in accordance with this requirement.

7. Nevertheless, the claim was referred to the Commissioners of the Board for their consideration. In a memo (No. 11) to the Commissioners on August 23, 1973, the Chairman of the Board of Review noted:

> The information alleged by the claimant did not establish that an accidental injury had occurred. Rather, it appears that the workman felt some discomfort in his back while doing his normal work. Nothing of a traumatic or accidental nature was advanced.

8. The Commissioners informed Mr. Ross on September 12, 1973 that his claim would remain disallowed "...for the reasons previously outlined by the Claims Department and Board of Review."

9. In January 1983 Ms. [redacted] of the Legal Services Society submitted on behalf of Mr. Ross a request for the Commissioners to reconsider his file. She argued that the Board of Review erred in law in 1973 when it took the position that Mr. Ross' claim should be denied because no specific accident had occurred at the time of Mr. Ross' injury.

10. Mr. N. Attewell responded for the Commissioners on May 11, 1983. He stated:

> The Commissioners agree that on December 29, 1966, there was no legal requirement that an 'accident' occur in the normal sense. It was sufficient that the claimant suffer a disablement resulting from his employment.

However, Mr. Attewell also noted that Mr. Ross' claim was denied in 1967 because the Board adjudicator decided that Mr. Ross' injury did not result from his work. Since the original decisions on the claim were not based on an error of law, Mr. Attewell concluded that these decisions could only be reviewed by the Commissioners if new evidence was submitted in support of Mr. Ross' claim. Since no new evidence had been submitted, the review was dismissed and the denial of Mr. Ross' claim was upheld.

Complaint:

That Mr. Ross' claim for wage-loss and a pension has been unfairly denied.

Employer Notification:

I have notified the employer of my possible recommendation because the employer is experience rated.

Issue Investigated:

Whether the evidence on file supports Mr. Ross' claim that his disablement arose from and in the course of his employment.

Findings:

1. Mr. Ross applied for compensation under Section 7(1) of the Workmen's Compensation Act (R.S.B.C. 1948):

> Where, in any industry within the scope of this Part, personal injury by accident arising out of and in the course of the employment is caused to a workman, compensation as provided by this Part shall be paid by the Board out of the Accident Fund.

To qualify for compensation, Mr. Ross had to satisfy the Board that his injury was related to his work.

2. The standard of proof required by the Board in a claim was discussed in Decision No. 52. The Board stated:

> The adjudicator must not start with any presumption against the worker, but neither must he start with any presumption in his favour. The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the adjudicator should consider what other evidence might be obtained, and he must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached.

3. Mr. Ross reported a back injury to his employer on December 29, 1966. He was treated at a first aid station in the middle of his shift. The following day he was admitted on the advice of his doctor to the hospital where he remained under care until January 13, 1967. Mr. Ross was treated by his doctor until April 1967 when the doctor reported that he was ready to resume his usual employment. Mr. Ross applied to the Board for compensation on January 12, 1967.

4. The employer also reported to the Board on January 12, 1967 and agreed that Mr. Ross had reported the injury. However, the employer did not believe that the injury was caused by his work because there was no evidence of over exertion or any unusual incident. The employer drew attention to Mr. Ross' previous back trouble.

5. The Board denied Mr. Ross' claim on February 2, 1967 on the ground that his work activity on December 29, 1966 was not responsible for his back injury. The adjudicator noted that he had been performing his normal work and that nothing unusual had occurred. The Board did not state what it felt was the source of Mr. Ross' injury. Mr. Ross' appeal in May 1967 was denied by the Board of Review which agreed with the reasoning expressed in the original decision.

6. The memos on Mr. Ross' file show that the Board was concerned about Mr. Ross' previous back injury on November 28, 1966. He had reported the injury and received first aid heat treatment but no further medical assistance. Mr. Ross had suffered no wage loss so he did not apply for compensation. There is no evidence to suggest that Mr. Ross' injuries developed because of a pre-existing back condition. The x-ray taken on December 30, 1966 showed no abnormalities in Mr. Ross' lumbar spine. At the time of his injury on December 29, 1966, Mr. Ross was neither disabled by a previous injury nor suffering from a pre-existing back condition.

7. The Board recognized that a compensable injury can arise from a worker's normal work in Decision No. 145 when it stated that "if a job requires a particular motion, and that motion results in injury, the injury arises out of the employment and is compensable." The Board has acknowledged that an injury does not have to arise from an unusual occurance or specific accident to be compensable. Mr. Ross' injury appears to have been caused by work-required motion.

8. In view of the foregoing, the preponderance of the evidence supports Mr. Ross' claim that his injury arose from and in the course of his employment.

Grounds for Adverse Recommendation:

Since the preponderance of evidence supports Mr. Ross' claim for compensation for an injury arising from and in the course of his employment, the Board's decision to deny Mr. Ross' claim is based upon a faulty weighing of the evidence and therefore is unjust.

Possible Recommendations:

That the Board reconsider Mr. Ross' claim for wage-loss in 1967 and review his medical condition to determine if he is entitled to a disability pension.

Karl A. Friedmann
Ombudsman

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway.
Richmond, B C.
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OFFICE OF THE COMMISSIONERS

30 May 1984

RECEIVED
MAY 31 1984
CMB. 90
VANCOUVER

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West 6th Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Warren T. ROSS
Claim No. XC66094141

Your letter dated April 6, 1984, has been considered by the Commissioners.

There is no dispute that Mr. Ross suffered an onset of back complaints while at work. The question at issue is whether those complaints resulted from his work. The Board denied his claim on the basis that at the time in question he was doing his normal work and nothing unusual occurred. It appears to the Commissioners that this decision was basically one of judgment reached by the Board at the time and can see no grounds for their reconsidering it.

You rely on Decision No. 145, but for two reasons the Commissioners do not consider that that referral is appropriate. Firstly, that decision as it relates to the Board's policy on "work required motions" was further explained in Decision No. 286 which recognizes the element of judgment in these types of situations. Secondly, and even more significantly, neither Decisions No. 145 nor No. 286 existed at the time that the decision was made on Mr. Ross claim. It does not seem to the Commissioners that the Board's policies of today should be used as criteria for reconsidering Board decisions made when the same policies were not in effect. A decision can only be judged on the basis of the law and policy in effect when it is made. The Commissioners consider that the decision on Mr. Ross' claim was reasonable by the standards of the time and should, therefore, be left unchanged.

continued...../2

RE: Warren T. Ross
Claim No. XC66094141 30 May 1984

In the result, the Commissioners have decided not to accept your proposed recommendation. Mr. Ross' claim will remain disallowed.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Province of British Colu(a

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dritish Columbia
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Telephone: (604) 736-8721

000126

File: 83-52109

July 17, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Mr. Warren T. Ross, Claim No. XC66094141

Pursuant to Section 22 of the Ombudsman Act, I enclose my report and recommendation regarding Mr. Ross' claim.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl.

REPORT

pursuant to Section 22 of the Ombudsman Act

Complainant: Mr. Warren T. Ross
Claim No. XC66094141

Authority: Workers' Compensation Board

Last Decision Level:

The Commissioners refused to reconsider Mr. Ross' claim in 1983 because he had not submitted any new evidence. The Commissioners did acknowledge that an error of law had arisen in reviews of the claim by a Board of Review and the Commissioners in 1973 but noted that the Board adjudicator's decision in 1967 to deny the claim was still valid because it was not based on the error of law. The adjudicator's decision had been affirmed by an internal Board of Review on April 17, 1967.

Background:

1. Mr. Ross reported an injury while employed at the Elk Falls Company Ltd. pulp mill in Campbell River on December 29, 1966. He felt a pain in his lower back when he pulled a short block off a loading conveyor with a picaroon while leaning over a waist-high railing. He received heat treatment for twenty minutes at the first aid station and returned to a different job for the remainder of the shift. Mr. Ross was unable to report to work the following day because of pain and stiffness in his back. He went to Dr. [redacted] who referred him to the Campbell River General Hospital.

2. Mr. Ross was admitted to the hospital on December 30, 1966 and remained there until January 13, 1967. Dr. [redacted] diagnosed acute disc syndrome but an x-ray revealed no sign of this or any other condition. Mr. Ross was treated with tranquilizers, traction, and physiotherapy. The physician's progress reports showed general improvement in Mr. Ross' condition through February 1967 with Dr. [redacted] stating that Mr. Ross could resume his usual employment on February 6, 1967. The report on March 6, 1967, however, indicated that Mr. Ross was fit for light duties only. Dr. [redacted] reported on March 31, 1967 that Mr. Ross was able to resume his usual employment as of April 1, 1967.

3. Mr. Ross completed his Form 6 on January 12, 1967. He described the work he was performing at the time of the injury. Mr. Ross noted that he had hurt his back on the same job on November 28,

1966 and that he had received the same heat treatment at the first aid station. The Employer's Report, also completed on January 12, 1967, acknowledged that the incident had occurred as described by Mr. Ross but indicated that the employer was not satisfied that an injury had resulted. The employer stated: "This workman has had previous back trouble. Both incidents reported do not indicate any unusual incident or over exertion other than the workman performing his normal required duties." The report confirmed that Mr. Ross had reported a back injury at the same job on November 28, 1966.

4. The Board denied Mr. Ross' claim in a letter dated February 2, 1967. The adjudicator wrote:

> In your application you have stated that on December 29, 1966, you were working on conveyor bringing in logs from the wood room to the ground wood department and while reaching over a railing with a picaroon for a short block you injured your back.
>
> In view of the above it would appear that you were doing your normal work and as nothing unusual has been described as occurring it is our opinion that this work activity on December 29, 1966, was not responsible for the back disability for which you complained and sought medical attention.

5. Mr. Ross appealed to an internal Board of Review on April 17, 1967. The appeal was denied on May 1, 1967 in a letter which stated that "we are directed to inform you that there is no change in the decision as communicated to you in our letter of February 2, 1967."

6. In July 1973 Mr. Ross asked the Board to review his file. His claim was considered by a Board of Review on August 23, 1973. In a letter of that date the Chairman of the Board of Review stated:

> It should be pointed out that at the time your claim was initiated, the Workman's Compensation Act only authorized compensation for "personal injury by accident." [original emphasis] The Board has advised you on different occasions that you have not established entitlement in accordance with this requirement.

7. Nevertheless, the claim was referred to the Commissioners of the Board for their consideration. In a memo (No. 11) to the Commissioners on August 23, 1973, the Chairman of the Board of Review noted:

The information alleged by the claimant did not establish that an accidental injury had occurred. Rather, it appears that the workman felt some discomfort in his back while doing his normal work. Nothing of a traumatic or accidental nature was advanced.

8. The Commissioners informed Mr. Ross on September 12, 1973 that his claim would remain disallowed "...for the reasons previously outlined by the Claims Department and Board of Review."

9. In January 1983 Ms. [redacted] of the Legal Services Society submitted on behalf of Mr. Ross a request for the Commissioners to reconsider his file. She argued that the Board of Review erred in law in 1973 when it took the position that Mr. Ross' claim should be denied because no specific accident had occurred at the time of Mr. Ross' injury.

10. Mr. N. Attewell responded for the Commissioners on May 11, 1983. He stated:

> The Commissioners agree that on December 29, 1966, there was no legal requirement that an 'accident' occur in the normal sense. It was sufficient that the claimant suffer a disablement resulting from his employment.

11. However, Mr. Attewell also noted that Mr. Ross' claim was denied in 1967 because the Board adjudicator decided that Mr. Ross' injury did not result from his work. Since the original decisions on the claim were not based on an error of law, Mr. Attewell concluded that these decisions could only be reviewed by the Commissioners if new evidence was submitted in support of Mr. Ross' claim. Since no new evidence had been submitted, the review was dismissed and the denial of Mr. Ross' claim was upheld.

12. My Preliminary Report was submitted to the Board, with a copy to the experience-rated employer, on April 6, 1984. Mr. [redacted] of Crown Forest Industries Ltd., the employer, responded to my report on April 17, 1984. He noted that Mr. Ross had reported back problems at work on June 24, 1964; September 8, 1965; March 5, 1966; November 28, 1966; and December 29, 1966. The company's records also showed that Mr. Ross missed shifts on September 11 and September 12, 1965 because his back was sore. The employer concluded that the Board's decision not to allow the claim was correct because "Mr. Ross' back difficulties developed over a considerable period of time and there is no evidence that they resulted from his employment."

13. The Commissioners responded to my Preliminary Report on May 30, 1984. Mr. Attewell wrote:

> There is no dispute that Mr. Ross suffered an onset of back complaints while at work. The question at issue is whether those complaints resulted from his work. The Board denied his claim on the basis that at the time in question he was doing his normal work and nothing unusual occurred. It appears to the Commissioners that this decision was basically one of judgment reached by the Board at the time and can see no grounds for their reconsidering it.

14. In particular, the Commissioners disputed my reliance upon Decision 145 regarding "work required motions" because this decision was not reached until well after Mr. Ross' claim had been denied. Mr. Attewell stated:

> It does not seem to the Commissioners that the Board's policies of today should be used as criteria for reconsidering Board decisions made when the same policies were not in effect. A decision can only be judged on the basis of the law and policy in effect when it is made. The Commissioners consider that the decision on Mr. Ross' claim was reasonable by the standards of the time and should, therefore, be left unchanged.

Complaint:

That Mr. Ross' claim for wage-loss and a pension has been unfairly denied.

Employer Notification:

I have notified the employer of my possible recommendation because the employer is experience rated. The employer's response has been identified in the background notes above and addressed in the findings below.

Issue Investigated:

Whether the evidence on file supports Mr. Ross' claim that his disablement arose from and in the course of his employment.

Findings:

1. Mr. Ross reported a back injury to his employer on December 29, 1966. He was treated at a first aid station in the middle of his shift. The following day he was admitted on the advice of his doctor to the hospital where he remained under care until January 13, 1967. Mr. Ross was treated by his doctor

until April 1967 when the doctor reported that he was ready to resume his usual employment. Mr. Ross applied to the Board for compensation on January 12, 1967.

2. The employer also reported to the Board on January 12, 1967 and described the accident: "While pulling a short block off the loading conveyor in the Groundwood using a picaroon, he felt a pain in his back." However, the employer did not believe that the injury was caused by his work because there was no evidence of over exertion or any unusual incident. The employer drew attention to Mr. Ross' previous complaints of back pain at work.

3. Mr. Ross applied for compensation under Section 7(1) of the Workmen's Compensation Act (R.S.B.C. 1948):

> Where, in any industry within the scope of this Part, personal injury by accident arising out of and in the course of the employment is caused to a workman, compensation as provided by this Part shall be paid by the Board out of the Accident Fund.

To qualify for compensation, Mr. Ross had to satisfy the Board that his injury was related to his work.

4. When a worker's injury arose from an accident, the presumption in Section 7(4) of the Act applied:

> Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment and where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

The accident described in the employer's report and by Mr. Ross in subsequent correspondence to the Board occurred in the course of the employment so it must be presumed that it arose out of the employment unless the contrary is shown. There is no evidence to the contrary in Mr. Ross' file.

5. If no accident has occurred, the standard of proof required by the Board in a claim is the standard discussed in Decision No. 52:

> The adjudicator must not start with any presumption against the worker, but neither must he start with any presumption in his favour. The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the adjudicator should consider what other evidence

might be obtained, and he must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached.

6. The Board denied Mr. Ross' claim on February 2, 1967 on the ground that his work activity on December 29, 1966 was not responsible for his back injury. The adjudicator noted that he had been performing his normal work and that nothing unusual had occurred. It must be noted, however, that Mr. Ross' normal work as a loaderman imposed a lifting and pulling strain on his back. Also, something "unusual" did occur: Mr. Ross developed a back pain that he felt warranted treatment at the first aid station.

7. The memos on Mr. Ross' file show that the Board was concerned about Mr. Ross' previous back injury on November 28, 1966. He had reported the injury and received first aid heat treatment but no further medical assistance. Mr. Ross had suffered no wage loss so he did not apply for compensation. There is no evidence to suggest that Mr. Ross' injuries developed because of a pre-existing back condition. The x-ray taken on December 30, 1966 showed no abnormalities in Mr. Ross' lumbar spine. At the time of his injury on December 29, 1966, Mr. Ross was neither disabled by a previous injury nor suffering from a pre-existing back condition.

8. The Board recognized that a compensable injury can arise from a worker's normal work in Decision No. 145 when it stated that "if a job requires a particular motion, and that motion results in injury, the injury arises out of the employment and is compensable." The Board has acknowledged that an injury does not have to arise from an unusual occurrance or specific accident to be compensable. If not caused by an accident, Mr. Ross' injury appears to have been caused by work-required motion.

9. Can Decision No. 145 which was made in October 1975 be applied to a 1966 claim? The Board has recognized that Mr. Ross' injury need not have been caused by an accident to be compensable. Decision No. 145 clarifies rather than alters the Board's perception of how compensable injuries can arise in circumstances where the specific incident which produced the injury cannot be identified. The decision did not establish new policy. Therefore, the decision is applicable to the review of Mr. Ross' claim. This position is stated in Training Note #97: "If the Board issues a specific interpretation of a statute, it will apply to earlier claims which come to light, and not only from the date of the interpretation."

10. The employer argues that there is no evidence that Mr. Ross' back difficulties resulted from his employment. I find that the evidence supports Mr. Ross' claim that his back problems resulted from his work. The pain developed while he was at work and was reported to the employer. On all occasions Mr. Ross was working as a loaderman in the Groundwood Department which involves the lifting and pulling strain to the back. Mr. Ross reported back pains on several occasions but made no claim for compensation until after the final injury on December 29, 1966. Mr. Ross' previous back complaints are consistent with a condition which developed over time as the result of work-required motion.

11. In view of the foregoing, the preponderance of the evidence supports Mr. Ross' claim that his injury arose from and in the course of his employment. The accident which caused Mr. Ross' injury was identified. It occurred at work. There is no evidence in the claim file to contradict the presumption that because the accident occurred in the course of the employment, it arose out of the employment. Even if a specific incident or accident could not be identified, the evidence supports the conclusion that on the balance of probabilities Mr. Ross suffered a compensable injury on December 29, 1966.

Grounds for Adverse Recommendation:

Since the preponderance of evidence supports Mr. Ross' claim for compensation for an injury arising from and in the course of his employment, the Board's decision to deny Mr. Ross' claim is based upon a faulty weighing of the evidence and therefore is unjust.

Possible Recommendations:

That the Board reconsider Mr. Ross' claim for wage-loss in 1967 and review his medical condition to determine if he is entitled to a disability pension.

Karl A. Friedmann
Ombudsman
July 17, 1984

Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
Vancouver
British Columbia
V6H 1A6
Telephone: (604) 736-8721

000134

File: 83-52109

July 19, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Mr. Warren T. Ross, Claim No. XC66094141

Please note that my report on Mr. Ross' claim shows an error on page 7. The heading "Possible Recommendations" should read "Recommendations".

Thank you for your attention to the above-noted correction.

Yours sincerely,

Karl A. Friedmann
Ombudsman

KH

000135

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

RECEIVED
NOV 14 1984
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VANCOUVER

13 November 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Warren T. ROSS
Claim No. XC66094141

Your letter dated July 17, 1984, has been considered by the Commissioners.

You are proposing that the Commissioners reverse the Board's decision and allow Mr. Ross' claim for a work injury occurring on December 29, 1966.

You rely in the first place on the presumption contained in Section 7(4) (now Section 5(4)) of the Workers' Compensation Act. That presumption applies when there has been an "accident". The established practice of the Board in respect of the word "accident" in regard to this presumption is that it is used in the normal restricted sense of a chance event. It does not cover cases such as this one where the claimant simply suffers an onset of pain while doing his normal work. The Commissioners have considered that practice in light of the expanded definition of "accident" contained in Section 2 of the Act as it was at the time of Mr. Ross' injury, but do not feel that that definition applied to Section 7(4). This was the opinion of Mr. Justice Tysoe set out at page 188-89 of his 1966 report. However, even if the Commissioners are wrong on this point, they are unable to agree with your suggestion that there is no evidence to rebut the presumption in this case. They feel that it could properly be rebutted

continued...../2

by the back problems Mr. Ross was having prior to December 29, 1966, by the fact that he was doing his normal work and by the fact that nothing unusual occurred.

You also rely on Decision No. 145. However, the Commissioners note that you have failed to refer to Decision No. 286 to which your attention was drawn in my May 30, 1984, letter. That decision makes it clear that the application of Decision No. 145 in any case is a matter of judgment for the Board. Decision No. 145 can never dictate the allowance or disallowance of a claim. The Commissioners, in any event, continue to maintain that it is inappropriate to judge the decision on this claim in the light of policies adopted long afterwards. They do not agree that Decision No. 145 was simply a clarification of existing policy. Training Note #97 to which you refer was not intended to have the effect you suggest. The statement from the Training Note quoted by you was only intended to refer to interpretations of the Act, which impliedly or expressly have the effect of declaring the previous interpretations invalid. In these cases, the Board concludes that there is only one proper interpretation of the provision in question and the Board previously erred in having a different interpretation. Clearly, in such cases, the Board may have to make the change retroactive. However, this does not apply in respect of most changes of policy. Most of the provisions of the Act under which the Board issues policies give the Board a discretionary power or a very broad scope for interpretation. The fact that a policy is changed does not mean that the previous policy was wrong but only that the member of the Board at different times have different philosophies. There is no necessity for making a change retroactive in such cases. The Board's policies under Section 5(1) of the Act, including Decision No. 145, fall within this category.

With regard to your general argument on the facts of the case, the Commissioners feel that this is a situation where you are simply reweighing the evidence and substituting

continued...../2

your judgment for that of the Board. The Board made a legitimate decision to deny this claim for which there was supporting evidence and which was in accordance with the policy and practice of the time. You have provided no significant new evidence or other grounds which would justify a change in that decision. In fact, the evidence of the employer which you provide on page 3 of your letter at point 12 tends to support the Board's decision. You suggest that the pre-December 29, 1966, incidents were all part of a gradual process of a developing work-caused back problem, but this is a highly speculative opinion for which there is no supporting evidence. The prior incidents suggest, in fact, that, notwithstanding the normal x-ray findings, Mr. Ross may have had an underlying condition in his back that was the real cause of his problems following December 29, 1966.

In the result, the Commissioners have decided to reject your proposal in this case. The disallowance of this claim will be maintained.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
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British Columbia
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Telephone: (604) 736-8721

000138

File: 82-7621

September 1, 1983

Mr. Art Gibbons,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Gibbons:

Re: Complaint of John Gray, WCB # RC8021S476

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

PRELIMINARY REPORT

pursuant to section 16 of the Ombudsman Act

Authority: Workers' Compensation Board

Complainant: Mr. John Gray

Background

Prior to February 1980 Mr. Gray had worked as an electrician for seven years. On February 25, 1980 a rung of the ladder he was standing on broke causing him to fall directly on his buttocks onto a concrete floor. An initial diagnosis of contusion of the sacrum was made. Mr. Gray received wage loss from February 26, 1980 until March 9, 1980 and, subsequently, had his claim reopened from June 17, 1980 to January 11, 1981.

Last Decision Level

On April 7, 1982 the Claims Adjudicator refused a request for surgery (Gill Procedure) "as it would appear the requested surgery is as a result of your pre-existing condition." It was felt that Mr. Gray's low back pain was related to "spondylolysis with grade 1 spondylolisthesis at the lumbosacral level".

Complaint

Mr. Gray states that he had no symptoms of low back pain prior to the accident and feels that he would not have required the surgery but for the accident of February 1980. However, the Board refuses any responsibility for that surgery.

Issue

Did the Board act unjustly in refusing Mr. Gray's request for surgery relating to an underlying condition?

Grounds for Adverse Findings

In my opinion this complaint may be substantiated on the following grounds:

1. Section 14:10 of the Claims Adjudication Manual states that it is normally not Board policy to pay compensation in respect of a surgical operation without also accepting the condition which leads to it. However, an exception to this is where a worker with a serious noncompensable pre-existing condition suffers a minor work injury which aggravates that condition.

"The injury may cause an onset of symptoms which, though primarily caused by the underlying condition, would not have been felt at that point of time without the injury. The only way of alleviating these symptoms may be a surgical operation to correct the underlying condition. Though the injury has triggered the immediate need for the surgery the injury is only a minor cause of the surgery and the worker's overall condition. In such a situation, the Board may, to alleviate the immediate symptoms following the injury, authorize the surgery. The Board will then pay compensation for the surgery and a reasonable period of post-operative recovery, but will not accept responsibility for the underlying condition which led to the surgery or, except insofar as it is a direct consequence of the surgery, for the subsequent condition of the worker." (emphasis added)

2. In Clinical Symposia (Volume 26, No.2, 1974, "Low Back Pain", H.A. Kein) Spondylolysis and Spondylolisthesis are described as being a defect of the vertebrae. (Page 14) Spondlylolysis is a common radiological finding in middle-aged and older people with low back pain.

"Spondylolysis is often asymptomatic, as has been demonstrated by its frequent chance discovery on x-rays taken for other reasons. The onset of symptoms in spondylolysis is, evidently, only precipitated when fatigue or injury upsets the normal homeostatic status of the spine. Thus, the occurence of spondylolysis should not be considered the cause of low back pain and all other possible causes must be excluded." (emphasis added)

3. What is the evidence of Mr. Gray's underlying condition and how was it considered by the Board? The material on file indicates that Mr. Gray never fully recovered after his accident in February 1980. On August 29, 1980 Dr. [redacted], Board Medical Advisor, reported, "He states that he hasn't improved appreciably since July 18, 1980. Certainly my examination has seen no appreciable changes." On admission to the Board Rehabilitation Clinic, on September 15, 1980, Dr. [redacted] pointed out, "Improvement has been minimal and variable. It has been characterized by one thing and that is the constant persistence of low back pain." On October 9, 1980, Dr. [redacted] stated, "This patient is not really much improved. He is having more back pain now and, furthermore, he is still getting pain in the left leg with ongoing weakness of the dorsiflexors of his toe and the extensors of his left foot." The main medical concern at this point appeared to be a possible disk protrusion.

4. On October 21, 1980 Mr. Gray was able to see an orthopaedic specialist for the first time. Dr. [redacted] reviewed the x-rays and concluded: "this patient's x-rays showed a grade 1 spondylolysis - that is L5 and slipped forward on S1. There is a defect in the pars intraarticularis bilateral and this obviously is one source of his back discomfort and may be the prime source as opposed to a disk." This is the first mention of any underlying condition.

5. With x-rays taken August 18, 1981, Mr. [redacted], a chiropractor, stated, "There is possibly a grade 1 spondylolysis at this level (L4-5)".

6. A second orthopaedic specialist, Dr. [redacted], reported on March 24, 1982 that "I think this man's low back pain is related to the spondylolysis with grade 1 spondylolisthesis at lumbrosacral level as seen in last x-rays. I think he would be helped by Gill Procedure at lumbrosacral level."

7. In memo # 22 the Claims Adjudicator wrote to the Board Medical Advisor, Dr. [redacted], "from a review of the info. on file, it appears this is a pre-existing condition, and would not relate to the back claim of February 25, 1980, and the surgery would not be our responsibility! Although Dr. [redacted] has not asked for our authorization, I feel he should be advised of this by letter. Do you agree?"

8. In memo # 23, April 2, 1982, Dr. [redacted] agreed that the surgery was not the Board's responsibility. On April 5, 1982 he wrote to Dr. [redacted] stating that the Board was unable to authorize the Gill Procedure as suggested.

9. On April 7, 1982, the Claims Adjudicator wrote to Mr. Gray stating that "it was felt your current low back pain was related to the spondylolysis with grade 1 spondylolisthesis at the lumbrosacral level. ...it would appear that the requested surgery is as a result of your pre-existing condition,...therefore, the request for surgery is being denied."

10. Mr. Gray underwent surgery by Dr. [redacted] in September 1982. This was paid for by his medical insurance but he was unavailable for work due to post-operative recovery for six months. He now reports only minor stiffness and very rarely pain: he considers the operation a great success.

Conclusions

1. There is no evidence of lower back pain prior to the accident of February 1980.

2. Following the accident Mr. Gray never fully recovered from his back injury. This was ultimately diagnosed as grade 1 spondylolisthesis.

3. There is authority in Clinical Symposia for the conclusion that the onset of symptoms of spondylolysis is only precipitated by injury. As well the Board's Medical Information Manual also states that spondylolysis and spondylolisthesis "may make the vertebral column more susceptible to relatively minor trauma." (Page 64)

4. This is a situation where section 14:10 of the Claims Adjudication Manual applies: the injury of February 1980 caused an onset of symptoms which, though primarily caused by the underlying condition, would not have been felt at that point of time without the injury.

5. I may therefore conclude that the Board acted unjustly in not consistently applying its policy with regard to surgery for an underlying condition.

Possible Recommendations

I have not yet reached a final conclusion on this complaint and I would appreciate your comments on the grounds set out above. In order to assist you in focusing your response, the following recommendations are open to me:

1. That the Board recognize its responsibility for Mr. Gray's surgery.

2. That the Board pay compensation for the surgery and for a reasonable period of post-operative recovery.

Karl A. Friedmann
Ombudsman
September 1, 1983

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

15 December 1983

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 82-7621

Dear Dr. Friedmann:

RE: John GRAY
Claim No. RC80215476

Your letter dated September 1, 1983, has been considered by the Commissioners.

You are proposing that the Board accept responsibility under the 1980 claim for the surgery undergone by Mr. Gray in his back.

A major part of your argument is an assertion that there is no evidence of lower back pain prior to the February 1980 injury. However, this is not supported by the information on file. Mr. Gray answered "yes" to the question whether he had any previous pain or disability. On his admission to the Board's Clinic in September 1980, it was noted that he had had problems in his back in 1972 and 1976. Mr. Gray had a compensation claim for his back in 1972 (SC72087633), but he had no back claim in 1976. His only claim in that year was for a knee injury (SA76180923). The Board's records show no back claims other than his 1972 and 1980 claims. No decision has been made by the Claims Adjudicator as to whether the surgery in question might be attributable to the 1972 injury.

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RE: John GRAY
Claim No. RC80215476

15 December 1983

You refer to #14.10 of the Claims Adjudication Manual, but the Commissioners do not consider that this provides a reason for questioning the Board's decision. The fact that the Board may as a matter of policy permit the acceptance of responsibility for surgery where there is a pre-existing condition does not mean that in every case it accepts responsibility for the surgery. There remains in each case a question of fact to be determined in accordance with the particular evidence on the claim whether the need for the surgery was brought on by the injury. The question at issue on this claim is one of fact rather than policy.

The Commissioners have concluded that the decision by the Claims Adjudicator on the 1980 claim was a reasonable one. It was supported by the opinion of the Board Medical Adviser, even though the Medical Adviser was under the impression that Mr. Gray had no problems prior to his 1980 injury. With regard to the 1972 claim, it may be that further investigation should be carried out by the Claims Adjudicator regarding Mr. Gray's condition between 1972 and 1980 and a decision made regarding that claim. Mr. Gray should be asked to elaborate on the back problems he had prior to 1980 and give the names of any medical practitioners from whom he sought medical attention.

Yours truly,

N. C. Attewell

N. C. ATTEWELL
Secretary to the Board

NCA:md

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA
4450 Lakelse Avenue
Terrace, B.C.
V8G 1P2
Telephone 635-6536
Telex 047-85559

000145

07 March 1984

Mr. John Gray
4936 McDeek
Terrace, B. C.
V8G 1C8

Dear Mr. Gray:

RE: Claim No. RC72087633

I have now completed my review of a request to re-open your 06 October 1972 right back and shoulder claim, and this letter will explain my decision to deny re-opening.

On that date, you were carrying a piece of pipe, the weight approximately 30 to 40 pounds, walking on loose sand, when you slipped, causing the pipe to shift on your shoulders. You continued working until noon on 10 October 1972, when you left to see your attending physician, who diagnosed sprained back muscles. You were later seen in consultation, at which time the diagnosis was made of a soft tissue injury of the right back area, region of the rhomboids. Your claim was accepted for this middle right back injury, and wage loss benefits were paid from 12:00 noon, 10 October 1972, through to 19 November 1972 as you returned to work on 20 November 1972. You attempted to re-open your claim in March 1973 due to ongoing right shoulder complaints, however, the re-opening was denied as it was felt when your claim was finalled you had full range of movement in your shoulder.

Your 1972 claim has again been reviewed as there is indication that you may have had prior lower back pain to the 25 February 1980 injury. However, after reviewing your 1972 claim, and speaking with your wife on 05 March 1984, there is no indication of any prior low back problems to your injury of 25 February 1980. Also, there is no indication of any prior low back problems, nor any treatment for any low back problems prior to February 1980.

In view of the above, I am unable to relate your medical treatment in March 1982 and the requested surgery at that time to your claim of 06 October 1972. Therefore, this claim will not be re-opened. I trust the above has been explained to your satisfaction. Should you have any further questions concerning the above, please feel free to contact me.

Yours truly,

S. Katz
Claims Adjudicator
SK/fp
cc: Dr. Karl A. Friedmann

When writing please refer to claim or firm number.

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Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
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000146

File: 82-7621

May 3, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: John Gray, Claim No. RC80215476

I have received Mr. Attewell's letter of December 15, 1983. In reply I have the following observations:

1. Paragraph 1 of the Conclusions of my Preliminary Report of September 1, 1983 is, as Mr. Attewell points out, incorrect. Mr. Gray did have a back injury (SC72087633) previous to the February 1980 injury that was the subject of my Report.

2. However, the file with respect to that 1972 claim indicates that the injury then is not relevent to the issue in dispute with respect to the 1980 injury:

   (i) The 1972 injury primarily involved the right shoulder while the 1980 injury involved the lower back.
   (ii) The 1972 injury was diagnosed as a muscle strain while the 1980 injury related to spondylolysis and spondylolisthesis.
   (iii) Material on the 1972 file indicates that there was no resulting disability. The x-ray report of October 10, 1972 concluded "no abnormality detected". The Unit Medical Officer, Dr. Dawson, stated in Memo #2 "there were no abnormal findings".

3. The Board's own recent investigation confirms this. On March 7, 1984 a Claims Adjudicator considered the question of re-opening the 1972 claim, apparently as a result of my Preliminary Report. The conclusion of the Adjudicator was that: "...there is no indication of any prior low back problems to your injury of 25 February 1980. Also, there is no indication of any prior low back problems, nor any treatment for any low back problems prior to February 1980."

4. I must, therefore conclude that the 1972 back injury has no bearing on the issue in dispute as described in my Preliminary Report.

5. Mr. Attewell further states, in his letter of December 15, 1983, that "there remains in each case a question of fact to be determined in accordance with a particular evidence on the claim whether the need for the surgery was brought on by the injury. The question at issue on this claim is one of fact rather than policy". I am not at all certain what this refers to in my previous recommendations.

6. If this refers to a factual determination of a worker's medical condition before a decision is made to implement the policy of Section 14:10 of the Claims Adjudication Manual I accept this as a self-evident administrative practice.

7. If the "question of fact" refers to possible complications caused by the 1972 back injury then I refer you to Paragraphs 1 to 4, above.

8. My view of Section 14:10 is that it permits the Board to provide surgery where an injury caused an onset of symptoms which, though primarily caused by an underlying condition, would not have been felt at that point in time without the injury. This is the "question of fact" to be determined before the Board accepts responsibility for the surgery.

9. I remain of the opinion that Mr. Gray's situation, for the reasons described in my Preliminary Report, is one which should be covered by Section 14:10 of the Claims Adjudication Manual. He had no lower back complaints prior to February 1980, his lower back never completely recovered from the 1980 injury, and there is authority to suggest that the underlying condition may have been precipitated by the injury.

I am writing this letter pursuant to Section 22 of the Ombudsman Act. On the grounds that the Board may have acted unjustly in not consistently applying its policy with regard to surgery for an underlying condition, I recommend that Mr. Gray be compensated for the surgery he underwent in September 1982 and that a payment for a reasonable time of post-operative recovery be made.

Yours sincerely,

Karl A. Friedmann
Ombudsman

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WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

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2 November 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: John GRAY
Claim No. RC80215476

Your letter dated May 3, 1984, has been considered by the Commissioners.

The Commissioners are prepared to accept that Mr. Gray had no significant back problems between 1972 and 1980 and that the 1972 injury was not a cause of the condition for which he had surgery in 1982. They also accept that, from a policy point of view, #14.10 of the Claims Adjudication Manual might be a possible basis for accepting the surgery if it were found as a fact that the surgery resulted in part from the 1980 injury. However, since the Board has found as a fact that the surgery was not necessitated by that injury, they consider that the policy has no application. Nor do they feel that you have pointed to any error in this conclusion of fact that would justify their changing the Board's decision. They note your argument based on the lack of previous significant back complaints and your suggestion that Mr. Gray never recovered from his injury, but must assert that since the surgery was in relation to a non-compensable pre-existing condition, it is open to the Board to find that the surgery was due to causes other than the injury. The Board's conclusion is supported by the Board Medical Adviser. The Commissioners feel that you are simply reweighing the available evidence and attempting to substitute your view for that of the Board. They see no reason why they should change the Board's decision on that basis.

In the result, the Commissioners have decided to reject your recommendation.

Yours truly,

N. C. ATTEWELL
Secretary to the Board
NCA:md

151 WESTMINSTER HIGHWAY, RICHMOND, B.C. V7C 1C6 / TELEPHONE 273-2266 / TELEX 04-357722 / WHEN WRITING PLEASE REFER TO CLAIM NUMBER

Legislative Assembly
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OMBUDSMAN

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S.16

File: 83-50995

June 8, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Albert Pipke, Claim No. XY80082754

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

for Karl A. Friedmann
Ombudsman

Encl. (1)

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

Complainant: Mr. Albert Pipke
Claim No. XY80082754

Authority: Workers' Compensation Board

Background:

1. Mr. Pipke is unusually sensitive to carbon monoxide fumes. He worked as a mechanic for 34 years. During his later years of employment he developed headaches which his doctor initially believed were a type of migraine. Finally, on November 22, 1980 he developed headaches and blurring of vision so that he was forced to leave work until December 9th.

2. Following his return to work on December 9, Mr. Pipke continued to experience severe headaches. On December 16th he was noted to have a blood carbon monoxide level of 22%. December 17th was his last day of work.

3. Wage loss was later paid by the Board from December 17th to December 19th, 1980.

4. Although his headache had subsided by the time he saw his doctor on December 20th, Mr. Pipke was told to stay off work by his attending physician. The Board regarded this as a preventative measure so did not pay wage loss as requested by Mr. Pipke from December 20th to December 31, 1980. Mr. Pipke terminated on December 31, 1980.

5. When he was not at work he was usually free of headaches although headaches have occurred when Mr. Pipke was in the proximinity of a gas driven chain saw and on busy highways and heavily trafficked city streets.

6. On March 3, 1981 Mr. Pipke sought to appeal to a Medical Review Panel. However, it was determined that there was no medical conflict on the claim but rather it was a matter of application of Board policy. It was therefore decided that the proper appeal route was to the boards of review.

7. Mr. Pipke appealed to the boards of review and was supported in this appeal by his attending physician, Dr. A. , who felt that Mr. Pipke had "marked symptoms of carbon monoxide toxicity" and that this represented "a work induced incapacity".

8. Mr. Pipke attended a board of review hearing on August 20, 1981 which considered the issues of the Board's failure to pay wage loss for the periods November 22 to December 8, 1980, December 20- 31st, and after January 1, 1981.

9. The board of review decision was issued on October 21, 1981. The board of review decided that: . "Medical evidence on file makes it abundantly clear that Mr. Pipke's recurring headaches were related to his exposure to carbon monoxide at his place of work." The board of review determined that during the periods in question Mr. Pipke was unable to return to his usual employment and that he was acting reasonably and on the advice of his attending physician who advised him not to return to a work environment where he would be exposed to carbon monoxide. The board of review recommended acceptance of the wage loss claim for the periods November 22 to December 8 and December 20 to December 31 but concluded "as the worker terminated his employment as of December 31, 1980 we do not feel that wage loss benefits would be appropriate past that date". This recommendation was accepted by the Board.

10. The board of review was also of the opinion that the worker should receive some rehabilitation assistance. "Because of his age and the specialization of his skills, he requires assestance (sic) to obtain gainful employment". The board of review proposed that there should be further active involvement on the part of Rehabilitation Services.

11. On January 25, 1982 Mr. Pipke appealed that part of the board of review decision which denied him wage loss benefits after December 31, 1980. On September 16, 1982 the Commissioners denied his appeal. The Commissioners pointed out that "...termination of your employment on December 31, 1980 resulted from Dr. A.'s prediction that further exposure to carbon monoxide would create a serious risk of carbon monoxide poisoning rather than from a diagnosis of existing carbon monoxide poisoning".

12. The decision letter also referred to Reporter Decision No. 206 which held that "the Board is not able to pay compensation to a claimant who has the same physical capabilities that he had prior to the occurrence of an industrial disease, but is precluded from a limited number of occupations because of a remaining propensity to suffer that disease. The Commissioners do not consider this policy to be contrary to Decision #38, since that decision deals with further deterioration from an already existing industrial disease rather than with the recurrence of a disease that had previously cleared up".

13. The file was forwarded to a Rehabilitation Consultant for attention. A number of meetings were held between a Rehabilitation Officer and Mr. Pipke, but nothing concrete resulted from these.

Complaint:

Mr. Pipke is complaining about the decision of the Board not to grant wage loss past December 31, 1980. He also is complaining about the level of service provided by Rehabilitation Services.

Last Decision Level

As noted, the last decision was that of the Commissioners dated September 16, 1982.

Employer Notification

I have not notified the employer in this case as the employer is neither experience rated nor is it a deposit account employer. It has not objected to the claim.

Issues Investigated

1. Did the Board err in its decision not to extend compensation benefits to Mr. Pipke past December 31, 1980?

2. Where sufficient efforts made on Mr. Pipke's behalf by the Board's Rehabilitation Services?

Findings

Issue #1 Wage Loss Cut Off

1. Given the findings and decision of the boards of review one has to ask - had Mr. Pipke not resigned his position but simply continued not to return to work, acting on the advice of his doctor, and had the employer held his position open, or had Mr. Pipke even continued to return to work intermittently, would

the Board have been obligated to continue paying wage loss for the days he was absent? The board of review decision would seem to suggest so. Presumably there might have been some pension consideration at some point as payment of wage loss would not likely go on indefinitely.

2. Mr. Pipke's resignation was the act of a person who at the time saw no other options open to him. He had spent the bulk of his working life in this type of employment but realized that to continue to do so could only result in continuing physical distress. Without realizing how vulnerable such an action would leave him, Mr. Pipke followed the only cause of action he could perceive as being open to him and reluctantly resigned his position.

3. Dr. [redacted], Assistant Director of Medical Services stated in a March 20, 1981 memo:

> "There is no dispute but what this man was exposed to carbon monoxide fumes and that he did develop levels which would provide symptoms and that he did have symptoms compatible with carbon monoxide overdose. ...However recovery is relatively rapid on removal from exposure..."

4. The board of review decided that "medical evidence on file makes it abundantly clear that Mr. Pipke's recurring headaches were related to his exposure to carbon monoxide at his place of work".

5. Mr. Pipke's situation parallels that of the worker who had an allergic reaction to red cedar dust. This case was preported in Reporter Decision No. 206, referred to above. The Board denied the worker a permanent disability award in that case.

6. Board policy on this type of situation is further explained in an April 15, 1981 memo from Claims Adjudicator, [redacted]:

> "...wage loss benefits are only payable for as long as there is medical evidence that an injured worker is suffering from a temporary disability which prevents him from resuming employment. It is not Board practice to consider that such a disability exists when a worker is capable of resuming employment but is advised not to enter a certain employment because of the harmful exposure he will suffer. No compensation is payable where a worker is off work for the purpose of preventing the onset of a condition rather than for the purpose of relieving a condition which he actually has."

7. My own perception of this matter is that Mr. Pipke's situation meets the requirements of the Workers Compensation Act Section 6(1). Mr. Pipke suffers from an industrial disease and is thereby disabled from earning full wages at the work at which he was employed. The disease is due to the nature of the employment in which the worker was employed. Mr. Pipke's case even more closely parallels the case of Mr. Emery which I have already brought to the attention of the Board, and which remains unrectified. Mr. Emery also later in life developed a sensitivity to a substance encountered in an industrial setting. Mr. Emery also was considered not to be a good candidate for retraining. Mr. Emery's case was reported in my Special Report No. 8 to the Legislative Assembly of B.C., but at this time no action has been taken by the Legislature about it.

8. I will not repeat the full range of arguments presented to the Board in Mr. Emery's case. They are a matter of record. I will quote one paragraph from my Report to the Legislature which I believe brings this issue into focus.

> I have recommended that the full range of compensation be available for workers who develop allergic industrial diseases. This would not necessarily mean a pension in every case: many workers will be able to find comparable employment away from the irritant - especially if retraining is offered by the Board - but in cases such as Mr. Emery's, a pension would remedy the severe injustice that has been caused by the Board's present definition of disability.

The last reference is to the Board's definition of disability as meaning a physical impairment or a loss of body function - a definition which does not extend to cover the condition of complainants such as Mr. Emery and Mr. Pipke - and a definition which I contend is not supported by the Workers Compensation Act.

Grounds for Adverse Recommendations

Based on the above, I may conclude that the Board's decision to disallow Mr. Pipke's claim was unjust in that it resulted from the application of a wrong principle.

Possible Recommendation

I would appreciate your comments on the grounds set out above. I am considering the following recommendations:

1. I repeat the general recommendation I earlier made to the Board in Mr. Emery's case:

Where a worker is forced to seek alternative employment as a result of a reactive industrial disease, rehabilitation should be offered when practicable; then a pension should be assessed on the basis of the loss of earnings method.

2. I add the specific recommendation relative to Mr. Pipke's situation:

Mr. Pipke should be assessed for a pension following the termination of wage loss benefits after December 31, 1980 as due to his susceptibility to carbon monoxide poisoning he was not able to continue employment as a mechanic and no other viable employment alternative was available to him.

Issue #2 Provision of Rehabilitation Services

1. In a memo dated April 29, 1981, Dr. G. [redacted], Medical Advisor noted that he had told Mr. Pipke's attending physician, Dr. A [redacted], "....that I would request help from the Rehabilitation Department to see if they could assist him in finding alternative employment". On May 6, 1982 the relevant material from Mr. Pipke's file was forwarded to the Vernon office for follow-up.

2. In a memo dated June 8, 1981, [redacted], Rehabilitation Consultant, recorded his telephone conversation of June 4 with Mr. Pipke. Mr. Pipke wanted retraining as a millwright or carpenter. "I explained to Mr. Pipke that at 60 years of age I really didn't think it was practical for him to expect to enter into an apprenticeship training program. Mr. Pipke conceded that this was not a particularly realistic approach".

3. Mr. Pipke had suggested trades training as a millwright or a carpenter. Mr. [redacted] invited Mr. Pipke to come into the Vernon office the following week in order to discuss plans. At the interview on June 10, 1981 Mr. Pipke again expressed interest in becoming a carpenter or an electrician. He had been employed all his adult life as an auto mechanic. The problem was finding alternative employment that would pay anything near what he had been making as a mechanic.

4. At age 60 it was unlikely that any employer would take him on in an apprenticeship role. The Consultant also discussed with Mr. Pipke the possibility of returning to the automotive business in some other capacity. Mr. Pipke had been to a number of local employers looking for work as a partsman or assembling rebuilt motors, but nothing was available.

5. A three month review was performed by Rehabilitation Services on August 13, 1981.

6. A memo from the Rehabilitation Consultant dated October 12, 1981 indicates that Mr. Pipke came unannounced with his decision letter from the Commissioners. The consultant made some suggestions to him concerning job possibilities.

7. A memo dated January 12, 1983 notes the effort of the consultant to get Mr. Pipke a job at a local auto wreckers.

8. Decision #333 states:

> "In circumstances where a change of occupation is advisable as an alternative for the prevention of the condition, the Board will assist in job relocation, training on the job programs, retraining and rehabilitation allowances upon removal from the work force that seems most equitable under the particular conditions of the case. Rehabilitation with a view to returning the worker to a productive job, free from exposure to offending agents will be the keystone of the approach to these conditions. It is expected that a worker will cooperate in any reasonable program of such a kind".

I cannot find fault with the effort made by Rehabilitation Services on Mr. Pipke's behalf. Efforts were made to consider his case and refer him to possible job opportunities. He was not totally ignored, and given his age and circumstances there did exist a real practical problem in obtaining alternate employment for him. Admittedly, it is not an easy task to locate suitable employment for a man who in later life experiences a serious functional disability which prevents him from continuing his ordinary work and who knows no other work.

Nevertheless, I wonder if the Board's Rehabilitation Counsellors could not be called upon to do just a little more in cases like that of Mr. Pipke, where the worker has no hope of re-entering his vocational field and age and physical limitations dim his or her prospects elsewhere. I do not claim to know what that "little more" might be. I leave that to those with expertise in the area and knowledge of the available resources. I will not make a recommendation about this matter but I would hope that the Board would stress to Rehabilitation Consultants that in situations where workers are caught in a predicament like that of Mr. Pipke - here is where they should go the extra mile.

Karl A. Friedmann
Ombudsman

June 8, 1984

000156

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

5 October 1984

Dr. Karl A. Friedmann
Ombudsman
Legislative Assembly of
British Columbia
#202 - 1275 West 6th Ave.
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

Re: Albert PIPKE
Claim No. XY80082754

Your letter dated June 8, 1984, has been considered by the Commissioners.

As you point out, the first issue you raise concerning Mr. Pipke's entitlement to a pension is identical to the issue you raised in the Emery case. The Commissioners' reply to your proposal is the same as in that case. They therefore reject your proposals. They do not see any value in repeating the reasons for this conclusion which are already set out in the correspondence on the Emery case.

With regard to rehabilitation assistance, the Commissioners agree that the Vocational Rehabilitation Department should make special efforts for persons such as Mr. Pipke. It does not seem to them that this requires any change in procedures or policies. They have, however, advised the manager of the department of your letter and asked him to remind his staff of the importance of early and comprehensive rehabilitation assistance in these types of cases.

Yours truly,

N.C. ATTEWELL
Secretary to the Board

NCA:hb

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Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
Vancouver
British Columbia
V6H 1A6
Telephone: (604) 736-8721

000157

File: 83-50995

October 24, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Albert Pipke, Claim No. XY80082754

Thank you for Mr. Attewell's letter of October 5, 1984 and the undertaking contained therein to advise the Manager of the Rehabilitation Services Department to remind his staff of the importance of early and comprehensive rehabilitation assistance in situations such as Mr. Pipke's.

With respect to the issue of Mr. Pipke's entitlement to a pension, I have nothing further to add to my letter of June 8, 1984. Pursuant to Section 22 of the Ombudsman Act and on the grounds that the Board's decision to disallow Mr. Pipke's claim was unjust in that it resulted from the application of a wrong principle, I am making the following recommendations:

1. Where a worker is forced to seek alternative employment as a result of a reactive industrial disease, rehabilitation should be offered when practicable; then a pension should be assessed on the basis of the loss of earnings method.

2. Mr. Pipke should be assessed for a pension following the termination of wage loss benefits after December 31, 1980 as due to his susceptibility to carbon monoxide poisoning he was not able to continue employment as a mechanic and no other viable employment alternative was available to him.

May I please have your reply?

Yours sincerely,

Karl A. Friedmann
Ombudsman

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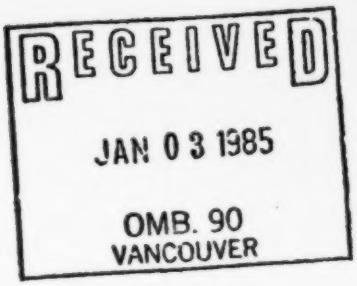

2 January 1985

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Albert PIPKE
Claim No. XY80082754

Your letter dated October 24, 1984, has been considered by the Commissioners.

The Commissioners are in agreement with your recommendation made under Section 22 of the Ombudsman Act to the extent that it deals with the provision of rehabilitation assistance. However, for the reasons given in respect of Mr. Emery's case, the Commissioners are unable to agree with your recommendation to the extent that it deals with the question of awarding a pension to Mr. Pipke.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
Vancouver
British Columbia
V6H 1A6
Telephone: (604) 736-8721

000159

File: 83-02302

March 15, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Mr. Dale Jones, Claim No. EC81331625

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl.(1)

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

Complainant: Dale Jones
Claim No. EC81331625

Authority: Workers' Compensation Board

Background:

Early in the day on February 2, 1981, Mr. Jones transferred a tool box, power saws and several other items from one truck to another. Later in the day, Mr. Jones experienced lower back pain and, the next day, sought treatment from a chiropractor. The eventual diagnosis of his condition was left low lumbar disc disease. Mr. Jones was treated for this condition for approximately one year after the incident of February 2, 1981.

Mr. Jones' claim for compensation was denied by the Claims Adjudicator on the basis that the injury related to an incident which took place before Mr. Jones' work shift began. This decision was upheld by the boards of review on the basis that there was insufficient evidence that the injury occurred as a result of work related activities. In a decision of March 8, 1983, the Commissioners concluded that the claim should not be allowed in view of the length of time between the incident, the onset of symptoms, and the seeking of treatment. The Commissioners also concluded that the disputed possibilities were not evenly balanced and that section 99 did not, therefore, apply, and that the worker's act of transferring the tools and equipment from one truck to another was in the course of his employment.

Issue:

The issue in this case is whether or not the Commissioners correctly applied section 99 of the Workers Compensation Act in considering Mr. Jones' claim for benefits.

Relevant Findings:

1. In order to transfer equipment from one truck to another, Mr. Jones had to twist his back as he swung the equipment up over the tailgate of one truck and down over the tailgate of the second truck. The items which he was moving consisted of a tool box weighing approximately 50 pounds, a gas can weighing approximately 35 pounds, 3 power saws and miscellaneous other supplies.

2. Mr. Jones states that he first felt symptoms of his back injury several hours later, while at work, and mentioned his discomfort to a fellow worker in the course of the day, and later in the evening. In fact, Mr. Jones' employer's accountant reported to the Board on March 10, 1981, that Mr. Jones had told a fellow worker that his back was hurting after he had transferred the tools and enroute to his work site on February 2, 1981.

3. By noon of February 3, 1981, Mr. Jones could not continue working and arranged for the first available transportation to a chiropractor. He did not seek treatment the previous day as he hoped that a good night's sleep and a hot shower would alleviate his symptoms.

4. Mr. Jones had no history of a previous back problem. Nor did x-rays reveal a degenerative condition of his spine.

Possible Recommendation:

Under all the circumstances, it appears to me that the Commissioners may have erred in concluding that the time separation between the work incident, the symptoms, and the treatment was too great, particularly in view of the fact that back injuries do not always develop immediately after the occurrence of the incident which causes them.

Based on the above findings, I am considering recommending that the Commissioners apply section 99 to Mr. Jones' situation and accept his claim for compensation.

Employer Notification:

The employer has been advised of my findings and proposed recommendation.

Karl A. Friedmann
Ombudsman
March 15, 1984

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

000162

OFFICE OF THE COMMISSIONERS

30 April 1984

Dr. Karl A. Friedmann
Ombudsman
Legislative Assembly of
British Columbia
#202 - 1275 West 6th Ave.
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

Re: Dale JONES
Claim No. EC81331625

Your letter dated March 15, 1984; has been considered by the Commissioners.

The Commissioners do not believe that you have provided any valid reasons for their reversing the prior Commissioners' decision of March 8, 1983. You question whether the Commissioners erred in concluding that the time separation between the accident and the onset of symptoms and receiving of treatment was too great. However, it seems to the Commissioners that the delay in question was a perfectly valid ground for disallowing the claim. One may no doubt argue about the significance of the delay in any case, but it is surely a matter of judgment, requiring an analysis of the particular circumstances of each case, whether a delay is of sufficient significance to require disallowance. The Commissioners can see no reason why your judgment of the matter should be preferred to that of the Commissioners in March 1983.

In the result, the Commissioners are unable to accept the recommendation you are proposing regarding this claim.

Yours truly,

N.C. Attewell

N.C. ATTEWELL
Secretary to the Board

NCA:hb

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1012, 1675 West Sixth Avenue
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File: 83-02302

July 17, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Mr. Dale Jones, Claim No. EC81331625

I have now considered your response of April 30, 1984 concerning the complaint of Dale Jones. On receipt of your letter, my investigator contacted [redacted], a chiropractor who treated Mr. Jones on February 3, 1981, one day after his work injury. I have enclosed a copy of this letter for your information.

Mr. [redacted]s letter raises two points relevant to Mr. Jones' claim. The first point is that, only one day after he first felt symptoms, Mr. Jones attributed his back problem to his work activity of the previous morning. The second point is Mr. [redacted]'s comment that it is very common for patients to have a delay in the onset of symptoms and that this delay can range from a few hours to a few days.

In Mr. Attewell's letter of April 30, 1984, the Commissioners state that it is a matter of judgement in each case whether a delay is sufficiently significant to support disallowance of a claim. Pursuant to Section 22 of the Ombudsman Act, I have concluded that the Commissioners' decision in this case is unjust and that there are no grounds for disallowing the claim on this basis.

I am therefore recommending that the Commissioners accept Mr. Jones' claim for compensation.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

Encl.(1)

Off
Res

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[redacted]
B.P.E. M.ed., D.C.
DOCTOR OF CHIROPRACTIC

[redacted] Quesnel, B C., [redacted]

June 20, 1 8'

212-1275 [illegible]
Vancouver, B.C.
V6A 2L5

Attention : M. Coleman

Re : Mr. Wil Jones
fil. # 83-03202

The above patient appeared at this office on February 3, 1981 complaining of a "sore low back". He stated that his disability arose from the bending and lifting associated with lifting a power saw and tool box.

It was found that he was suffering from low back sprain and associated soft tissue lesions.

He was treated 2-3 times a week for a month or so and responded well to chiropractic treatment.

In answer to your inquiry as to the 3-4 hour delay in the onset of symptoms : it is very common for patients to have a delay in the onset of symptoms of a few hours and sometimes a few days.

If you have any other queries, please do not hesitate to contact us.

Yours truly,

[redacted]

[redacted].

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WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

24 September 1984

Dr. Karl A. Friedmann
Ombudsman
Legislative Assembly of
British Columbia
#202 - 1275 West 6th Ave.
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

Re: Dale JONES
Claim No. EC81331625

Your letter dated July 17, 1984, has been considered by the Commissioners.

The Commissioners note the report dated June 20, 1984, which you provide from Mr. Jones' chiropractor, but do not consider that it justifies a change in their previous conclusion. While it may be possible for there to be a delay between an injury and the onset of symptoms, a delay is also something which raises questions as to the validity of a claim. It is for the Board to consider the significance of a delay in any case having regard to the overall circumstances of the case. That consideration involves an exercise of judgment. The Commissioners can still see no reason why your judgment of the matter should be preferred to that of the Board.

In the result, the Commissioners have decided to reject your recommendation. Mr. Jones' claim will remain disallowed.

Yours truly,

N.C. ATTEWELL
Secretary to the Board

NCA:hb

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